

Ambiguity, Sovereignty, and Identity in Ireland: Peace and Transition

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I. INTRODUCTION

"[We] recognise the birthright of all the people of Northern Ireland to identify themselves and be accepted as Irish or British, or both" ¹

Ambiguity, sovereignty, and identity have all played roles in both the evolution of the Republic of Ireland and in the peace process in Northern Ireland. The meaning of Irish nationhood, its contrast to British nationhood, and the degree to which persons identifying themselves with each category have formed the basis of conflict and have frustrated its resolution for at least three-quarters of a century. In 1921, the Irish partition created the "Free State" in the South as a dominion of the British Empire.² For those who view sovereignty as absolute and indivisible, it is notable that the Free State was not sovereign at birth. However, the ability of the Free State's leaders to run its own affairs, and within three decades transmute the state into a republic, demonstrated a gradual capture of sovereignty from the British Crown. The subtlety and ambiguity of this transition likely diffused British opposition to it at any single historical point. By 1949, it was an irreversible political fact.³

During the years of the Free State's ambiguous evolution into a fully sovereign republic (1921–1941), the state of Northern Ireland, by contrast, suffered from pernicious clarity.⁴ One was either Catholic or Protestant, nationalist or unionist. One was either loyal to the United Kingdom or desired reunification with the South. One either believed that Ireland should be sovereign over the six counties of the North or that the United Kingdom should be. It was the unionists—the persons who believed they were British and should remain part of the British state—whose clear, unambiguous position prevailed. In fact, Great Britain had created the political unit of

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¹ THE AGREEMENT: AGREEMENT REACHED IN THE MULTI-PARTY NEGOTIATIONS 2 (1998) [hereinafter THE AGREEMENT]. This multi-party agreement among the various political groupings and governments signed on April 10, 1998, at Belfast is variously known as the Belfast Agreement, the Stormont Agreement, the Good Friday Agreement (GFA), and The Agreement.

² D. GEORGE BOYCE, IRELAND 1828–1923: FROM ASCENDANCY TO DEMOCRACY 102–03 (1992).

³ DANIEL WEBSTER HOLLIS III, THE HISTORY OF IRELAND 166 (2001).

⁴ DAVID MCKITTRICK & DAVID MCVEA, MAKING SENSE OF THE TROUBLES: THE STORY OF THE CONFLICT IN NORTHERN IRELAND 4–7 (2002).

Northern Ireland on their behalf. Under the "Stormont" system of government, "the other"—the Irish, the nationalist, and the Gaelic—were excluded from power, effectively disenfranchised.⁵ The dominant unionists could not envision sharing that power without compromising the clarity of their vision, their British identity, and the sovereignty of the Crown.

Only after the civil rights movement of the 1960s and 25 years of the violent Troubles⁶ did the need for benevolent ambiguity prevail. This article examines how ambiguous treatment of sovereignty and identity has been necessary to gain peace in Northern Ireland. This necessity has been recognized in the power-sharing arrangements of the Good Friday Agreement and its language about identity and tolerance.

While necessary for peace-making and visible in the implementation and elaboration of the Good Friday Agreement, we must now ask whether the ambiguity is useful or obstructionist in peace-building.

II. CONSTRUCTIVE AND DESTRUCTIVE AMBIGUITY

*Blair: IRA Failure to Disarm Hinders Pact*⁷

The Irish Republican Army's failure to disarm and renounce violence fully remains the major barrier to reviving a Catholic-Protestant administration in Northern Ireland, British Prime Minister Tony Blair said Thursday.

Blair, speaking in London, said the recent electoral triumph of the IRA-linked Sinn Féin and Protestant hard-liners from the Democratic Unionist Party made it more important than ever for the IRA to deliver clear peace commitments.

...
"There was a time in Northern Ireland when ambiguity was a necessary friend. It is now an enemy, an opponent, of this process working," Blair said. *"It's got to be clear. After 5½ years of the Good Friday agreement, you cannot expect people to sit down in government unless they are all playing by the rules."*...⁸

⁵ On the outskirts of Belfast, Stormont is the location of the legislature and other government offices of Northern Ireland. It has become a place-metaphor that stands for the system of unionist rule.

⁶ See *infra* note 112 and accompanying text (referring to troubles).

⁷ This excerpt is taken from Shawn Pogatchnik, *Blair: IRA Failure to Disarm Hinders Pact*, BOSTON GLOBE, Jan. 15, 2004, available at http://www.boston.com/news/world/europe/articles/2004/01/15/blair_ira_failure_to_disarm_hinders_pact (last visited Oct. 25, 2004).

⁸ *Id.* (emphasis added).

On the day before the conference at Ohio State, which this symposium issue memorializes, Tony Blair asserted in the British press that the time for ambiguity in the Northern Irish peace process was past.⁹ What did he mean by this? Is lack of clarity ever a good thing in conflict resolution—and at what point does it turn bad? Why had it now turned bad in Mr. Blair's estimation? Ambiguity, trust, and misunderstanding riddle Northern Ireland. How was the 1998 Good Friday Agreement possible after hundreds of years of conflict, outrage, and mistrust? Why has implementation of the Agreement stalled after five years, with the two major communities in the North appearing to polarize (at least at the ballot box) rather than reconcile?

Ambiguity sometimes allows two competing sides to maintain differing views of the future, while apparently negotiating agreement on that future. The course of the Oslo peace process for the Middle East, as well as the Irish Good Friday process, reveal the tactic of suppressing incompatible intentions. Views of history usually differ even more profoundly than those of the future, and probably underlie divergent prospective visions.

Consider the Glorious Revolution. While teaching International Human Rights Law, I have for years presented the Glorious Revolution of 1689 and the resulting English Bill of Rights as landmark progressive events. Parliamentary democracy triumphed over Stuart absolutism.¹⁰ Civil liberties were guaranteed.¹¹ The stage was set for the American and French Revolutions, and the template was set for the Declaration of Independence, the U.S. Bill of Rights, and the French Declaration of the Rights of Man and Citizen. John Locke's liberal democratic philosophy took concrete political form for the first time.¹²

The nationalist community sees itself as the victim of colonization for the better part of a millennium, beginning with the first English invasion of Ireland in 1169 by Anglo-Norman nobles and that of Henry II two years later.¹³ (Nationalists do use the word "colony" to describe Ireland's status, although the British tend to reject that characterization by pointing out that colony was never the island's legal status under the British Empire.)

The worst of the colonial repression occurred in the centuries following

⁹ *Id.*

¹⁰ HUMAN RIGHTS IN WESTERN CIVILIZATION: 1600–PRESENT 7 (John A. Maxwell et al. eds., 2d ed. 1994) [hereinafter HUMAN RIGHTS].

¹¹ Admittedly, I would warn my students that such rights were not immediately granted to all segments of the population, whether in England, America, or France.

¹² HUMAN RIGHTS, *supra* note 10, at 17–18.

¹³ MÁIRE O'BRIEN & CONOR CRUISE O'BRIEN, IRELAND: A CONCISE HISTORY 41–52 (1992).

the Protestant Reformation, when British empire-building combined with religious division and zeal. The English finally consolidated their rule over Ireland in the sixteenth and seventeenth centuries.¹⁴ Oliver Cromwell, whom mainstream history seems to treat with mixed approval (perhaps responsible for this treatment in some measure was his role in entrenching the power of Parliament to resist monarchical despotism, even if he was a bit fanatic and despotic himself), is viewed by the Irish to have been Hitler-like in his evil. Upon defeating the Irish in the early 1640s, Cromwell's troops engaged in significant massacres.¹⁵ After the slaughter, Cromwell's forces divested the Irish of much land, awarding it to his British officers as a new Anglo-Irish nobility.¹⁶ For the next three centuries, these new lords would depend on the support and import of a Protestant peasantry (and later working class) brought to the north of the island as colonists from the Scottish lowlands and from England.

Again, mainstream Anglophone history resonates discordantly with Irish perceptions. In the late 1600s, the English Parliament continued the struggle that had lasted most of that century against Stuart absolutism.¹⁷ The two Charleses and two Jameses had indeed sought to limit Parliament's power and thus the growth of representative democracy. Emerging Enlightenment philosophers such as John Locke gave philosophical foundation to the politics of parliamentary power. A religious element enhanced the conflict through the seventeenth century, in varying degrees, depending on the tenor of the times and whether the particular James or Charles was merely a high Anglican, a closet Catholic, or an overt Catholic—the latter being most offensive to the Puritan-leaning parliaments. Push came to shove when the parliamentary party encouraged the Dutch Prince of Orange, William, to wrest the English throne from James II.¹⁸ William, along with his Protestant and parliamentary supporters, was successful at ousting James II from power. On Britain itself, the "revolution," which was rather bloodless, gave birth to the English Bill of Rights and entrenched representative democracy with its

¹⁴ *Id.* at 61–76.

¹⁵ See Douglas Laycock, *Continuity and Change in the Threat to Religious Liberty: The Reformation Era and the Late Twentieth Century*, 80 MINN. L. REV. 1047, 1062–63 (1996); see also HOLLIS, *supra* note 3, at 56–57.

¹⁶ O'BRIEN & O'BRIEN, *supra* note 13, at 68–69.

¹⁷ See generally Louise Halper, *Measure for Measure: Law, Prerogative, Subversion*, 13 CARDOZO STUD. L. & LIT. 221 (2001); Michael W. McConnell, *Tradition and Constitutionalism Before the Constitution*, 1998 U. ILL. L. REV. 173 (1998); Laura Zwicker, *The Politics of Toleration: The Establishment Clause and the Act of Toleration Examined*, 66 IND. L.J. 773 (1991).

¹⁸ Laycock, *supra* note 15, at 1065.

Enlightenment foundations—hence the term “Glorious.”¹⁹

The Irish did not share in the glory. First, the war between the Jacobites and the Williamites shed more blood on their soil than in Britain. The forces battled at Derry (Londonderry), on the Boyne, at Aughrim, and elsewhere in Ireland.²⁰ Nationalists do not remember William as a champion for representative democracy, human rights, or the Enlightenment. Whatever may have been (or became) the case in England itself, Williamite victory brought with it *no* native Irish representation in the emerging British democracy; in essence, it was an extinguishment of their political, cultural, and economic rights, and laid the grounds for future tribal taunting and hegemony by Ulster Protestants quite unenvisioned by Lockian political thought.

Profound tension over the “Marching Season” harkens back to this historical ambiguity. The unionist community celebrates the events of 1689, particularly the Battle of the Boyne (where the forces of William definitively defeated those of James) and the siege of Derry (where a semi-mythical band of Protestant craft apprentices purportedly saved the population from slaughter at the hands of the Stuart army by bravely rushing to close the city gates in the nick of time).²¹ Each July, loyalists march through the streets of Northern Ireland celebrating these victories. The marchers claim to be merely honoring their history and tradition. Nationalists condemn the marches as triumphalist taunting—a ceremonial boot on the neck.²² The fact that the parades wind through now Catholic neighborhoods aggravates the insult. The Marching Season, with its dramatic historical resonances, has precipitated a major portion of recent years’ tension in Ulster.²³

Such fundamentally contradictory interpretations of history must remain unsettled, but uncontrolling for a peace process to work. Tony Blair probably understood this historical irreconcilability when he made his observation about the time for ambiguity having past. But while ambiguity of belief may never pass, what must go is the ambiguity of promised action. Sinn Fein is

¹⁹ *Id.*

²⁰ HOLLIS, *supra* note 3, at 63–64.

²¹ See, e.g., NEIL JARMAN & DOMINIC BRYAN, PARADE AND PROTEST: A DISCUSSION OF PARADING DISPUTES IN NORTHERN IRELAND 15–17 (1996); Dominic Bryan, *Problems of Religious Nationalism: Parading Protestants and Consenting Catholics in Northern Ireland: Communal Conflict, Contested Public Space, and Group Rights*, 5 CHI. J. INT’L L. 233, 237 (2004); Brian P. White, *Walking the Queen’s Highway: Peace, Politics and Parades in Northern Ireland*, 1 SAN DIEGO INT’L L.J. 175, 209–10 (2000).

²² Kelly Conlan, Note, *The Orange Order Looks to the First Amendment: Would It Protect Their Parades?*, 17 J.L. & POL. 553, 557–60 (2001).

²³ *Id.*

Blair's target here. IRA disarmament was promised in the Good Friday Agreement.²⁴ In exchange for disarmament they received some profound gains, chief among them shared government and the recognition of an Irish national right of self-determination.

But the IRA has not disarmed. It has submitted sporadically to an opaque "inspection" system administered by an apparently weak-willed Canadian soldier-diplomat who has confirmed some IRA munitions have been put "beyond use" without clarifying what that ambiguous phrase means and without providing the evidence for his conclusions.²⁵

If ambiguity is no *longer* called for, when was it so? Blair implicitly recognized the crucial need for ambiguity in reaching a peace agreement in April 1998. Unionists, fearing domination and discrimination at the hands of an all-island Catholic majority, insisted on a document that protected the current status of the union with Great Britain as long as a majority of voters in the North supported that status.²⁶ Thus, the first paragraph of the "Constitutional Issues" section of the GFA reads, "The participants . . . will: recognise the legitimacy of whatever choice is freely exercised by a majority of the people of Northern Ireland with regard to its status, whether they prefer to continue to support the Union with great Britain or a sovereign united Ireland."²⁷ The second paragraph, however, reads:

The participants . . . will: recognise that it is for the people of the island

²⁴ According to the Agreement,

[a]ll participants accordingly reaffirm their commitment to the total disarmament of all paramilitary organisations. They also confirm their intention to continue to work constructively and in good faith with the Independent Commission, and to use any influence they may have, to achieve the decommissioning of all paramilitary arms within two years following endorsement in referendums North and South of the agreement and in the context of the implementation of the overall settlement.

THE AGREEMENT, *supra* note 1, at 20.

²⁵ PAUL DIXON, NORTHERN IRELAND: THE POLITICS OF WAR AND PEACE 269–74 (2001); Dan Keenan, *Confidentiality Agreement Means General Can Only Hint at Extent of IRA's 'Third Act'*, IRISH TIMES, Oct. 22, 2003, at 8, available at LEXIS, News Library, Itimes File; David Sharrock & George Jones, *General May Go over Failure of IRA to Disarm*, DAILY TELEGRAPH (LONDON), July 3, 2001, at 8, available at LEXIS, News Library, Telegr File.

²⁶ ROGER MACGINTY & JOHN DARBY, GUNS AND GOVERNMENT: THE MANAGEMENT OF THE NORTHERN IRELAND PEACE PROCESS 42–49 (2002); MCKITTRICK & MCVEA, *supra* note 4, at 218–25; Brendan O'Leary, *Has Gerry Adams Signaled What Sinn Fein Really Wants?*, SCOTSMAN, July 24, 1997, at 8, available at LEXIS, News Library, Scotsm File.

²⁷ THE AGREEMENT, *supra* note 1, at 2.

of Ireland alone, by agreement between the two parts respectively and without external impediment, to exercise their right of self-determination on the basis of consent, freely and concurrently given, North and South, to bring about a united Ireland, if that is their wish, accepting that this right must be achieved and exercised with and subject to the agreement and consent of a majority of the people of Northern Ireland.²⁸

Such recognition of an island-wide Irish national right of self-determination was necessary to get Sinn Fein to agree to the document; it was also important, of course, to the Irish Republic and to the SDLP (at the time the largest N.I. nationalist political party). These two paragraphs were both the cornerstones and the foundational ambiguity of the Good Friday Agreement. How could the Irish nation possess a *right* to all-island self-determination at the same time the unionist community possessed the *right* to insist on the current union with Britain by holding an electoral majority in the six northern counties? True, rights are almost never absolute (*cf.* free speech, where one is not permitted to yell "Fire!" in a crowded theater). In this case, however, such an explanation leaves one dissatisfied. Sure, rights are not absolute. However, these two rights, each foundational to the Agreement, approach mutual exclusivity. A margin of psychological ambiguity, perhaps, allowed each side to focus on its negotiated victory. Nationalists could savor the victory of the British recognition of one Irish nation inhabiting the entire island with entitlement to rule it. They could rationalize the electoral veto over unification held by the Protestant majority in the North as a transient power; demographics would change it as Catholics increased their population proportion and successful coexistence might even bring a share of the Protestant community to the cause of unification.

On the other hand, unionists could focus on *their* right of self-determination, guaranteed at the polls, and believe that they would not be forced into an undesired unification for the foreseeable future.²⁹ (Most pro-agreement Unionists probably have a different expectation of the

²⁸ *Id.*

²⁹ Anti-Agreement unionists, *i.e.*, loyalists, were less sanguine about protection of their right under the document and about the demographic future. DIXON, *supra* note 25, at 12–14. See generally CHANGING SHADES OF ORANGE AND GREEN: REDEFINING THE UNION AND THE NATION IN CONTEMPORARY IRELAND (John Coakley ed., 2002) [hereinafter CHANGING SHADES]. See also John Coakley, *Constitutional Innovation and Political Change in Twentieth-Century Ireland*, in CHANGING SHADES, *supra*, at 1, 26–27 [hereinafter Coakley, *Constitutional Innovation*]; John Coakley, *Conclusion: New Strains of Unionism and Nationalism*, in CHANGING SHADES, *supra*, at 132, 144–146 [hereinafter Coakley, *Conclusion*]; David Ervine, *Redefining Loyalism*, in CHANGING SHADES, *supra*, at 57, 57–63.

demographic future than most nationalists. They might be right; while the Catholic birthrate is higher, so is the emigration rate of Catholics.)

Furthermore, human rights guarantees within the document should ease the fears of all groups (except perhaps for fringe loyalists and republicans). Here Europeanization has probably played a role. The European Convention for Human Rights protects all citizens of both the Republic and the United Kingdom under international law. The Good Friday Agreement promises to solidify such protections further by incorporating them into domestic law in the North³⁰ and possibly in the Republic:

The Irish Government will also take steps to further strengthen the protection of human rights in its jurisdiction. The Government will, taking account of the work of the All-Party Oireachtas Committee on the Constitution and the Report of the Constitution Review Group, bring forward measures to strengthen and underpin the constitutional protection of human rights. These proposals will draw on the European Convention on Human Rights and other international legal instruments in the field of human rights and the question of the incorporation of the ECHR will be further examined in this context. The measures brought forward would ensure at least an equivalent level of protection of human rights as will pertain in Northern Ireland. In addition, the Irish Government will:

- establish a Human Rights Commission with a mandate and remit equivalent to that within Northern Ireland;
- proceed with arrangements as quickly as possible to ratify the Council of Europe Framework Convention on National Minorities (already ratified by the UK);
- implement enhanced employment equality legislation;
- introduce equal status legislation; and
- continue to take further active steps to demonstrate its respect for the different traditions in the island of Ireland.³¹

Thus, the Catholics can expect a final end to the systematic discrimination suffered in the North under the Stormont system. Reciprocally, Protestants are protected against discrimination should the electoral balance in the North tip toward reunification and they find themselves a minority in a united Ireland. (It is true that not all unionists trust such protections—but a significant enough proportion did to allow the Good Friday Agreement to be approved, even by a majority of northern Protestant voters.)

³⁰ THE AGREEMENT, *supra* note 1, at 16.

³¹ *Id.* at 17–18.

But Tony Blair was not referring primarily to such ambiguity of conflicting foundational rights in his January 21 remarks. He was referring to a narrower ambiguity of results promised in the decommissioning language of the Good Friday Agreement. Having been one of the architects of an edifice of compromise and creative ambiguity, Blair should not have been surprised that the IRA/Sinn Fein would continue to play the politics of the vague (even regarding the fact that Sinn Fein is the political expression of the IRA). After all, republicans had already won the concession on the principle of self-determination.³² That was a horse out of the barn. The British could not take that back, regardless of the status of IRA munitions. At most, the British and the unionists could continue the delay of the power-sharing government for Northern Ireland. The IRA figured that as long as they vaguely employed language of disarmament (*i.e.*, “beyond use”), they could fix blame on the British and unionists for stalling the peace process.

As a result, in the November 2003 elections for representatives to a Northern Ireland Assembly that was not sitting due to the ongoing impasse, each community, nationalist and unionist, moved to its respective extremes. This gave dominance for the first time to Protestant loyalists (the DUP) and republicans (Sinn Fein) at the expense of the moderates from both communities that had led the Good Friday compromises.³³

III. VOCABULARY AND AMBIGUITY: THE AGREEMENT

The Agreement of April 1998 signed by the British and Irish governments and multiple parties in Northern Ireland is variously known as the Good Friday Agreement, the Belfast Agreement, and simply The Agreement. There seem to be nationalist overtones in the name “Good Friday Agreement,” although it is not exactly clear why. Good Friday is certainly a Catholic holiday, but for that matter it is also a Protestant holiday. Similarly, why Protestants would have a preference for “Belfast Agreement” as its title is equally obscure. Both Catholics and Protestants reside in that city. In any event, the title is one of the many linguistic ambiguities that threads its way through the fabric of this conflict.

³² MCKITTRICK & MCVEA, *supra* note 4, at 187–191, 196–99, 220–21.

³³ Mark Hennessy, *Robinson Transfers Give DUP Second Seat to Match UUP*, IRISH TIMES, Nov. 29, 2003, at 31, available at LEXIS, News Library, Itimes File; Dan Keenan, *Major Shock for SDLP but SF Puts in Effective Performance*, IRISH TIMES, Nov. 28, 2003, at 10, available at LEXIS, News Library, Itimes File.

IV. HISTORY I

Ireland's transition to democracy has spanned decades and centuries. It is peculiar, perhaps unlike any other democratic transition due to its protracted length, its bifurcation, and its emergence within an already democratic state (the United Kingdom).

Democratic transition in Ireland erupted with the first great wave of democratic revolution in the late eighteenth and early nineteenth centuries.³⁴ The 1798 "United Irishmen" Revolt led by Wolfe Tone drew inspiration from the American and French Revolution that preceded it by a few years.³⁵ Successful Latin American rebellions would sweep colonialism from most of the Western Hemisphere a few years later. In half a century of democratic revolutions, between 1775 and 1825, the Irish attempt was notable for its lack of success.³⁶

Tone's failed revolt led to an immediate transition *away* from democracy.³⁷ The British government shut down the Dublin Parliament.³⁸ All self-rule ended, and governing power was transferred to Westminster.³⁹ It would remain fully there until the Irish rebellion of the early twentieth century. Of course, the limited home rule that had existed in the eighteenth century under the Dublin Parliament was only that of a principally Anglo-Irish aristocracy.⁴⁰ However, given the electoral reform within Westminster itself in the 1830s, where more Britons gained the right to participate in the

³⁴ Native Irish had resisted a British role prior to this, of course, in many a war and rebellion over the centuries. The 1798 rebellion was the first in the liberal democratic mode. See generally Walter J. Walsh, *Redefining Radicalism: A Historical Perspective*, 59 GEO. L. REV. 636 (1991).

³⁵ HOLLIS, *supra* note 3, at 80–84.

³⁶ BOYCE, *supra* note 2, at 7–11. Of course, the United States and most of Latin America won independence from their European colonial rulers during these fifty years, and the French successfully overthrew their monarchy in 1789. The Irish rebellion in 1798 was unfocused, disorganized, and unsuccessful.

³⁷ The revolt represented the last serious alliance of native Irish Catholics and Scots Presbyterians against the English elite. Reduced discrimination against the non-conformist Presbyterians and land competition with the Irish caused the Scots-Irish to realign with the English. HOLLIS, *supra* note 3, at 80–83; O'BRIEN & O'BRIEN, *supra* note 13, at 89–92.

³⁸ See K. THEODORE HOPPEN, *IRELAND SINCE 1800: CONFLICT AND CONFORMITY* 13–14 (1989); CHARLES TOWNSHEND, *IRELAND: THE 20TH CENTURY* 3 (1998). This act of merging the Irish and British Parliaments was known as the Act of Union.

³⁹ HOPPEN, *supra* note 38, at 14.

⁴⁰ See D. GEORGE BOYCE, *NATIONALISM IN IRELAND* 95–96 (3d ed. 1995); see also BOYCE, *supra* note 2, at 5.

selection of their representatives, it might have been expected (had the Dublin Parliament continued) that a legislature on the island itself would have meant eventual participation and earlier participation of the Catholic majority in the self-government. Instead, the nineteenth century saw an almost total disenfranchisement of the majority of Irish people from the governing of their island.⁴¹ One might wonder whether the Potato Famine that devastated Ireland in the middle of that century would have had such harsh results had native Irish people, as well as the Anglo-Irish and Scotch-Irish elites, controlled events on the island.

After the Potato Famine and a failed revolt in 1848, Irish nationalism took at least three forms—Fenianism (probably the earliest form of republicanism), a constitutional home rule movement, and cultural revival.⁴² Interestingly, many of the leaders of these Irish national movements in the late nineteenth century included members of the Protestant elite, such as Charles Stewart Parnell on the political front and W. B. Yeats on the cultural front.⁴³

One of the peculiarities of this long struggle, this long transition to democracy, was that it occurred within an already democratic structure. The United Kingdom was, by the late nineteenth century, a democratic state. Ireland sent representatives to the Westminster Parliament, which was responsible for directly governing the island,⁴⁴ but democratic structure does not guarantee democratic result. The franchise was still sufficiently limited in the nineteenth century and the Irish seats sufficiently few in number that participation within British democracy did not mean for the bulk of Irish participation in democracy for themselves.⁴⁵ Few Irish peasants could afford to stand for Parliament, let alone travel to London and maintain themselves there. Landlordism still dominated the economy of a mostly rural Ireland, leaving the Catholic peasantry politically weak, as well as economically vulnerable.⁴⁶ Nonetheless, unlike pure colonies of Britain in Africa or Asia at the time, nineteenth century Ireland was legally an integral part of the United Kingdom with representation at Westminster. Thus, the rebellion to come in

⁴¹ See 21 THE NEW ENCYCLOPEDIA BRITANNICA 1012–13 (15th ed. 1992) [hereinafter ENCYCLOPEDIA BRITANNICA]; HOLLIS, *supra* note 3, at 89–90.

⁴² See HOLLIS, *supra* note 3, at 107–10, 116.

⁴³ *Id.* at 110, 116–17.

⁴⁴ See ENCYCLOPEDIA BRITANNICA, *supra* note 41, at 1012; BOYCE, *supra* note 2, at 62.

⁴⁵ CONOR CRUISE O'BRIEN, PARNELL AND HIS PARTY: 1880–90, at 11–13 (1957); MARCUS TANNER, IRELAND'S HOLY WARS 206–07 (2001). See also BOYCE, *supra* note 2, at 62–63.

⁴⁶ O'BRIEN, *supra* note 45, at 13–20; TANNER, *supra* note 45, at 206.

the early twentieth century was unusual among anti-colonial revolts in that it was a rebellion within a democratic state.⁴⁷

From its beginnings, Irish nationalism has contained inherent ambiguities. Did the nationalism include only Catholics or did it include the Protestant population as well? Certainly at times it included both groups, and some of its leadership was from the Protestant community at critical points in history.⁴⁸ Did the nationalism preclude continuation under the British crown? Up until World War I, the predominant strand seemed to assume some sort of continuing link with Britain and the loose-knit movement ambiguously referred to as "home rule."⁴⁹ That phrase seemingly implies self-government within a limited sovereignty. In fact, the home rule movement had finally achieved some legislative success by the beginning of the Great War.⁵⁰

For decades, the Liberal Party (and its prime ministers, when in power) tended to favor some sort of Irish home rule, which would have at least included a return to a Dublin parliament. When conservative governments came to power during this era, they tended to pull back from such a move. However, by 1914, the Westminster Parliament had committed itself to Irish home rule, a commitment interrupted by the outbreak of World War I.⁵¹ Many Irish troops fought in that conflict, Protestant and Catholic alike. The shipyards at Belfast, dominated by Protestant labor, were a main source of armament for the British Navy. A small, armed revolt during Easter Week 1916 by Irish republicans who were not willing to wait for the war's end, nor to remain part of the British Empire, resulted in the broadening of a second current of Irish nationalism, more turbulent than the stream in which home rule flowed—republicanism. This serious rift and the serious ambiguity in Irish nationalism continues to this day between gradualists and absolutists. For decades there has been an ebb and flow, as these two streams compete for dominant position. Before Easter 1916, the current represented by the republican extreme was shallow and narrow. However, British overreaction to the Easter Rebellion, and particularly the summary execution of the leaders of the revolt enraged the Irish public, horrified much of the rest of the world, and birthed a popular following for uncompromising republicanism,

⁴⁷ This was a democratic state, albeit a multinational state, with a semi-disenfranchised Irish minority.

⁴⁸ For example, Henry Grattan was a Protestant political leader of Irish Parliament during legislative independence. See HOLLIS, *supra* note 3, at 78–88.

⁴⁹ See generally ALAN O'DAY, *IRISH HOME RULE 1867–1921*, at 22–58 (1998).

⁵⁰ See BOYCE, *supra* note 2, at 87–88; THOMAS HENNESSEY, *DIVIDING IRELAND: WORLD WAR I AND PARTITION 1–2* (1998).

⁵¹ HENNESSEY, *supra* note 50, at 76–77.

particularly among the Catholic population.⁵²

Easter 1916

I have met them at close of day
 Coming with vivid faces
 From the counter or desk among grey
 Eighteenth-century houses.
 I have passed with a nod of the head
 Or polite meaningless words,
 Or have lingered awhile and said
 Polite meaningless words,
 And thought before I had done
 Of a mocking tale or a gibe
 To please a companion
 Around the fire at the club,
 Being certain that they and I
 But lived where motley is worn:
 All changed, changed utterly:
 A terrible beauty is born.

.....
 Too long a sacrifice
 Can make a stone of the heart.
 O when may it suffice?
 That is heaven's part, our part
 To murmur name upon name,
 As a mother names her child
 When sleep at last has come
 On limbs that had run wild.
 What is it but nightfall?
 No, no, not night but death.
 Was it needless death after all?
 For England may keep faith
 For all that is done and said.
 We know their dreams; enough
 To know they dreamed and are dead.
 And what if excess of love
 Bewildered them till they died?
 I write it out in a verse –
 MacDonagh and MacBride
 And Connolly and Pearse
 Now and in time to be,

⁵² See JOSEPH M. CURRAN, *THE BIRTH OF THE IRISH FREE STATE 1921–1923*, at 12–14 (1980); MCKITTRICK & MCVEA, *supra* note 4, at 3–4.

Wherever green is worn,
Are changed, changed utterly:
A terrible beauty is born.⁵³

From the Easter Rebellion on, the more extreme tenor of the nationalist movement likely gave credence to the extremist faction within the Protestant community in the North, whose sense of besiegement seemed more legitimate in the face of a radical Irish Republic than with the mere prospect of self-rule inside a British Empire.⁵⁴ The movement probably made it difficult for Protestant supporters of a united and self-governing Ireland to even a voice or find anyone to listen to their voice, even though such Protestants had often been heard at earlier moments of the national movement.

Between the Easter Rebellion of 1916 and the formation of the Irish Free State in the South in 1921, the twentieth century's first era of Irish "Troubles" was characterized by confusing alignments and enmities: Irish fought British; Irish Protestants fought Catholics, both north and south. When it finally became clear that Irish republicans could not win full military victory against the British and the armed Protestant unionists in the North, gradualists and absolutists within the nationalist community went to war with each other in the Irish Civil War of 1922 to 1923.⁵⁵ Nationalist leader Michael Collins signed the Anglo-Irish Treaty with the British in 1921; this treaty allowed for partition of the island into a "Free State" in the 26 counties of the South and a Protestant-dominated state in the northeast which would remain part of the United Kingdom. Anti-treaty forces not willing to settle for anything less than a united, all-island Irish Republic attacked the pro-treaty forces politically and militarily as sellouts and traitors.⁵⁶ This civil war within Ireland was not between Protestants and Catholics but between

⁵³ W. J. MCCORMICK, *IRISH POETRY: AN INTERPRETIVE ANTHOLOGY FROM BEFORE SWIFT TO YEATS AND AFTER 158–59* (2000).

⁵⁴ Ireland, MSN ENCARTA, available at http://encarta.msn.com/encyclopedia_761566701_6/Ireland.html (last visited Oct. 25, 2004); Ronald A. Christaldi, *The Shamrock and the Crown: A Historic Analysis of the Framework Document and Prospects for Peace in Ireland*, 5 J. TRANSNAT'L L. & POL'Y 123, 141–43 (1995). This is not to claim that a majority of Protestants ever favored home rule with a united Ireland.

⁵⁵ See HENNESSEY, *supra* note 50, at 166–68; TOWNSHEND, *supra* note 38, at 110–16.

⁵⁶ Michael Collins, History Learning Site, at <http://www.historylearningsite.co.uk/michaelcollins.htm> (last visited July 7, 2004); see also HOLLIS, *supra* note 3, at 134–35; O'BRIEN & O'BRIEN, *supra* note 13, at 160.

Catholics and Catholics.

With the Anglo-Irish Treaty of 1921 and the creation of the Irish Free State, Ireland's democratic transition became a split one.⁵⁷ The South first became a self-governing part of the British Empire as a "dominion," like Canada or Australia at that time.⁵⁸ After the pro-treaty forces prevailed in the civil war, the development of democracy in the Republic of Ireland and that in the six counties of the North followed different tracks.⁵⁹

V. VOCABULARY AND AMBIGUITY: ULSTER

Unionists often refer to the state in which they live, Northern Ireland, as "Ulster." The active use of this term shows an ambiguity that I have not heard unionists actually discuss. It raises the question of whether their purported "nation" is Great Britain or an entity called Ulster. Nationalists, on the other hand, eschew the use of "Ulster" to refer to the territory that is now part of the United Kingdom in northeast Ireland. They also avoid "Northern Ireland" as a description of a state. They prefer to refer to the land as the "Six Counties," with the implication that some day, when unification occurs, these six counties will join their 26 counterparts in the South to unite the island.⁶⁰ (Also seemingly acceptable is "north of Ireland" or "the North.") Nationalists point out that Ulster was never merely the six counties that presently make up Northern Ireland. Ulster was one of the four major provinces of historic Ireland, but it included nine counties, not just these six. Three of the counties of old Ulster were detached at the time of partition because their Catholic populations would have made the assurance of a Protestant majority in

⁵⁷ The British Parliament passed the Government of Ireland Act in 1920, dividing the island into Southern Ireland and Northern Ireland. The Anglo-Irish Treaty of December 1921 established the former as the Irish Free State. See TOWNSHEND, *supra* note 38, at 105-13 (1999).

⁵⁸ See *ENCYCLOPEDIA BRITANNICA*, *supra* note 41, at 1013-14; TANNER, *supra* note 45, at 291.

⁵⁹ See generally HOLLIS, *supra* note 3, at 133; MCKITTRICK & MCVEA, *supra* note 4, at 5; O'BRIEN & O'BRIEN, *supra* note 13, at 144-52. The South gradually evolved from a British dominion to an independent but sectarian republic between the early 1920s and the late 1940s. Such sectarianism arguably limited its full transition to democracy during these early years of stepwise independence from Britain. On the other hand, the six counties remain part of Great Britain and its democratic structure, but lack true democracy because of the domination of the Stormont Protestant elite. See generally *infra* Part VI.

⁶⁰ See Jennifer Todd, *The Reorientation of Constitutional Nationalism*, in CHANGING SHADES, *supra* note 29, at 71, 73-76.

Northern Ireland less certain.⁶¹

VI. HISTORY 2

The pro-treaty party that won the Civil War initially governed the Free State.⁶² This is understandable as anti-treaty forces rejected the very notion of a non-unified Ireland. The Irish Republican Army⁶³ rejected the Free State and, in fact, was outlawed by it as well as by the United Kingdom.⁶⁴ Interestingly, some relatively moderate anti-treaty forces did enter the political process within self-governing southern Ireland by the late 1920s. In 1932, these forces came into power as the Fianna Fail Party.⁶⁵ What were they governing? They were governing a dominion of the British Empire which they did not accept. As a result, Fianna Fail steered the evolution of southern Ireland away from Britain.

In 1937, a constitution was drafted in which the British Crown was nowhere mentioned; however, nothing was formally done to remove Ireland from the Empire.⁶⁶ The Free State was renamed Eire, Gaelic for Ireland, and the Constitution laid claim to sovereignty over the entire island.⁶⁷ The British did nothing to contest the constitution, perhaps because a new war with Germany was on the horizon. Eire did not participate in that war, but instead held back as a neutral.⁶⁸ Within a few years of the war's end, in 1949, southern Ireland declared what was already a reality—that it was, in fact, a republic and had no further ties with the British Crown or Commonwealth.⁶⁹

During the 1920s, 1930s, and 1940s, Ireland, the southern state, made a more-or-less successful transition to democracy. By the late 1940s, it had two major political parties: Fine Gael and Fianna Fail.⁷⁰ Fine Gael was the successor to the original pro-treaty forces from the 1920s and Fianna Fail the

⁶¹ DIXON, *supra* note 25, at 4; MCKITTRICK & MCVEA, *supra* note 4, at 4–5.

⁶² See O'BRIEN & O'BRIEN, *supra* note 13, at 153.

⁶³ The IRA has had numerous incarnations over the years. Thus, the one active in 1921 at the time of partition is not the same organization that exists today.

⁶⁴ HOPPEN, *supra* note 38, at 180.

⁶⁵ TOWNSHEND, *supra* note 38, at 129–34.

⁶⁶ *Id.* at 144–46.

⁶⁷ See *id.*

⁶⁸ *Id.* at 151–52.

⁶⁹ O'BRIEN & O'BRIEN, *supra* note 13, at 160.

⁷⁰ The Labor Party has at times played a role as a third party in Irish politics as a partner in coalition government.

partial successor to the anti-treaty forces.⁷¹ Interestingly, by the late 1940s their policies were strikingly similar. In fact, it was pro-treaty Fine Gael, the original compromisers, who were in power when the Irish Republic was declared in 1949. And while the anti-treaty Fianna Fail grew closer in appearance and policy to its historical enemy, pro-treaty Fine Gael, it grew apart from its one-time anti-treaty allies, the militant republicans. In fact, for years Fianna Fail presided over the government of the Republic of Ireland that outlawed the IRA and its political wing, Sinn Fein.⁷² So was Fianna Fail in fact a constitutional, nationalist party just like Fine Gael? Or did it continue to be a republican party like Sinn Fein? Such ambiguity continues to this day, and a now-legalized Sinn Fein competes with Fianna Fail for republican electoral support in the South of Ireland, just as it competes against the constitutional nationalist party SDLP in the North.⁷³

In the six counties of the North, the bifurcated transition to democracy took the form of the Stormont system in which Unionists totally dominated political and public life in Northern Ireland behind a democratic, parliamentary façade.⁷⁴ But such democratic form was belied by its discriminatory result. Because of legislative gerrymandering as well as the decision to reject proportional representation, after partition, the Catholic community in the North was almost totally disenfranchised from political power.⁷⁵ Through the 1920s, 1930s, and 1940s, Catholics in the North sometimes looked southward for political support in a struggle to fight such discrimination, however, they received little support. While the Nationalists in the South proclaimed in their 1937 Constitution a right to rule all of Ireland, in practice they seemed to have little interest in engaging the Protestant majority in the North in any conflict. Periodically, northern Nationalists would make attempts at reform within the established electoral and bureaucratic system, but they were unsuccessful.⁷⁶ By the 1960s, the

⁷¹ *Ireland*, MSN ENCARTA, available at http://encarta.msn.com/encyclopedia_761566701_5/Ireland.html (last visited Oct. 26, 2004). Sinn Fein/IRA also would claim successorship to anti-treaty forces of the 1920s.

⁷² *Irish Republican Army*, MSN ENCARTA, available at http://encarta.msn.com/encyclopedia_761575144/Irish_Republican_Army.html (last visited Oct. 25, 2004).

⁷³ See Coakley, *Constitutional Innovation*, *supra* note 29, at 1, 19, 26–28; *Perspectives on the Future of Northern Ireland*, in CHANGING SHADES, *supra* note 29, at 155–57.

⁷⁴ See DIXON, *supra* note 25, at 67–69. Stormont is the locale where the legislature sits.

⁷⁵ *Id.*

⁷⁶ MCKITTRICK & MCVEA, *supra* note 4, at 7–13, 21–25.

Catholic community in Ulster was underrepresented in the legislature, the executive, and the bureaucracy, and it received less than its share of employment, housing, health, and other benefits made available through the government.⁷⁷

One might wonder how in democratic, twentieth-century Britain, apparently democratic structures could be used in such an undemocratic way. A number of factors were at work. First, the six-county mini-state of Northern Ireland could be regarded itself as an artificial, undemocratic creation. The historic province of Ulster actually included nine counties but the three counties of western Ulster were carved away from Northern Ireland because that would have threatened the clear Protestant majority in the new territory.⁷⁸ So, for example, the city and county of Donnegal, predominately Catholic and historically part of Ulster, was not made part of Northern Ireland. Second, the voting system employed in Northern Ireland was a "first past the post" system similar to that in the rest of Britain. It was a "majority" system (in contrast to a proportional representation system).⁷⁹

Both systems are found in various parliamentary democracies. However, the proportional representation system is better suited to situations in which there is a permanent minority whose interests are under-represented in a parliament made up of single districts where minority candidates lose out to those from the majority community. In the first Northern Irish elections, even though the Catholic population represented a third of the six counties, it was only able to elect a much smaller proportion of delegates.⁸⁰ Essentially, Catholic interests in the Northern Ireland assembly could be permanently ignored.

The politics of domination made this situation even more inequitable. The Protestants in power gerrymandered the electoral districts so that even fewer nationalist representatives were sent to the assembly at Stormont.⁸¹ Such an unrepresentative government controlled the civil service. Public administration totally lacked Catholic managers at its upper levels in Northern Ireland for the half-century after partition. Even middle levels of administration had very few Catholic employees. Catholics generally had access to only the lowest level of public sector jobs, and even there in less than their proportional numbers in the population.⁸²

⁷⁷ *Id.* at 10–13.

⁷⁸ *Id.* at 4–5.

⁷⁹ *Id.* at 8; TOWNSHEND, *supra* note 38, at 118–19; HOLLIS, *supra* note 3, at 154.

⁸⁰ MCKITTRICK & MCVEA, *supra* note 4, at 9.

⁸¹ *Id.* at 8; TOWNSHEND, *supra* note 38, at 190–91.

⁸² TOWNSHEND, *supra* note 38, at 192–96.

Social organizations, particularly the Orange Order, further tightened the Protestant stranglehold on civil and economic life. These purely Protestant, fraternal groups cemented relationships between members of the elite in the North from the 1920s onward.⁸³ They provided leadership for government, civil service, and private enterprise while celebrating the triumph of Protestant rule in the British Isles. These organizations run the parades that create such tension in Northern Ireland each summer during the so-called "marching season." These parades celebrate Protestant victories over Catholics that occurred hundreds of years ago. It was often in the halls of the Orange Order that political decisions were made and economic and social policies were decided upon for governance of the Northern Irish state. The leadership of the Orange Order, overlapping significantly with the leadership of government in the Stormont system, was able to ladle out patronage in the form of jobs, housing, and other economic benefits to its constituency while leaving the nationalist constituency in the cold.⁸⁴

VII. VOCABULARY AND AMBIGUITY: NATIONALIST AND REPUBLICAN

When broadly used, "nationalist" can mean the entire community of Ireland, North and South, which supports a single united state for that island. Irish nationalism of this sort probably first arose in its modern form in the nineteenth century. In the North today, nationalists, again in a broad sense, refers to the entire community which seeks unity with the South—that is, a single state that identifies itself as an Irish state. In a slightly narrower sense, nationalist is sometimes used to describe the Catholic community in Northern Ireland. Some prefer this term to the word "Catholic" because they argue that the basic conflict in Ireland is not one of religion, but one of political belief and power. While it is probably true that there may be a small percentage of Protestant nationalists in the North and perhaps a few Catholic unionists who prefer to remain part of the United Kingdom, generally speaking, the use of the term "nationalist community" in Northern Ireland can generally be taken to refer to the Catholic community. Sometimes the word nationalist is used in an even narrower sense. I have heard *republicans* say they are not nationalists. Here, they are distinguishing themselves from constitutional nationalists who believe in the gradual process of reunifying Ireland through peaceful legislative means. Under the broader definition,

⁸³ See HOLLIS, *supra* note 3, at 82; O'BRIEN & O'BRIEN, *supra* note 13, at 92–97; THE OXFORD ILLUSTRATED HISTORY OF IRELAND 181–83 (R.F. Foster ed., 1989). See generally Coakley, *Constitutional Innovation*, *supra* note 29, at 1, 13; MCKITTRICK & McVEA, *supra* note 4, at 13–17; White, *supra* note 21, at 178.

⁸⁴ MCKITTRICK & McVEA, *supra* note 4, at 13–17.

republicans would be considered part of the nationalist community.

Until the Easter Rebellion of 1916, probably the bulk of nationalists probably assumed that Irish nationhood would be realized within the context of the British Empire, in the form of home rule.⁸⁵ Only a small section of nationalists envisioned a complete break from the Crown. Such “republicans” were given a large political boost by the national reaction to the brutal way the British suppressed the 1916 uprising.⁸⁶ From that point on, republicanism represented a major strand within nationalism under which armed struggle was viewed as a legitimate means of attaining Irish independence and unity. Ironically, once the southern counties of Ireland became independent and eventually a republic, republicanism started to mean less to the population there. In fact, the leadership of the Republic of Ireland has so disapproved of the radical republicanism of the IRA that for most of its existence, that organization has been illegal in the South as well as in the North.⁸⁷

VIII. DIALOGUE 1

Sean: The people of Ireland deserve self-determination. It is their right.⁸⁸

John: There is no “people” of Ireland. There are two communities here, and the majority community in the North has its own right to self-determination. We’re British and we want to be part of the United Kingdom. We have that right.

Sean: But it’s one island. The Irish nation is a natural unit. It occupies the entire island.

John: Then I suppose you also would say that neither the Welsh nor the

⁸⁵ The home rule movement occurred in the nineteenth and early twentieth centuries. See HOLLIS, *supra* note 3, at 113–14; see generally O’DAY, *supra* note 49.

⁸⁶ DIXON, *supra* note 25, at 4, 8; DAVID FITZPATRICK, *THE TWO IRELANDS: 1912–1939*, at 58–63 (1998); ULICK O’CONNOR, *MICHAEL COLLINS AND THE TROUBLES: THE STRUGGLE FOR IRISH FREEDOM 1912–1922*, at 79–104 (1996); O’DAY, *supra* note 49, at 268–69.

⁸⁷ Heidi L. Wushinske, Note & Comment, *Politicians and Paramilitaries: Is Decommissioning a Requirement of the Belfast Agreement?*, 17 TEMP. INT’L & COMP. L.J. 613, 625 (2003).

⁸⁸ Sean is a republican, John a unionist, Liam a nationalist, Lou a loyalist, Frank a Belgian Europeanist, Joseph a historian, Mary a Catholic mom, and Betty a Protestant mom.

Scots have any right to rule themselves. The English are the dominant ethnic group on that island—the island of Britain. They should rule it all under your logic.

Sean: But they do and they have.

John: But do you agree that they should?

Sean: The difference is that Britain conquered Ireland and it has continued to hold on to a third of that conquest illegitimately.

John: So it is not a matter of territorial unity. It's a matter of who committed an historical wrong 400 years ago.

Sean: It's both of those things. This was an Irish island and Britain took it away. Now it has failed to give back a major part of it.

John: The majority living in Northern Ireland has lived here for centuries. They have worked the land. They have manned the factories. Are we supposed to disappear? I suppose you think that 300 million Americans should give back their country to the Indians from whom they stole? And for that matter, the Canadians, the Brazilians, the Australians, and Argentineans as well? You can't unscramble an omelet.

Sean: We'll ignore the fact that an omelet is not scrambled. In any event, it is not the right metaphor. Regardless of the situation that Australians, Canadians, Americans, and New Zealanders find themselves in, the wrong done to Ireland *can* be undone. While a few hundred thousand Indians perhaps can't expect to reclaim America, for Ireland it is simply a matter of reunifying with the Republic that already exists.

John: And what about the self-determination rights of the majority that live in Ulster?

Sean: For one thing, you don't have a majority in "Ulster." Ulster was nine counties of old Ireland. The British carved away three of those nine just to gerrymander the rest into a Protestant enclave. But in any case, when the island is reunited your minority will be protected by rights under the European Convention and rights under the Irish Constitution. That is more protection than the Brits ever accorded us

and certainly more than you accorded us under the Stormont System.

John: Why should we trust your supposed rights? Can we believe bomb-throwers, house-burners, murderers, terrorists?

Sean: Violence during the troubled years was self-defense on the part of Republicans fighting against an occupation army. It was a war of liberation.

John: It was not! But even in a war, there are rules. The laws of war outlaw the slaughter of innocent civilians. The IRA trampled on all humanitarian principles when it ignored those rules.

Sean: Catholic babies, women, and old folks were slaughtered too. Loyalist militias were just as vicious in their violence—more vicious than the IRA. Loyalist thugs more regularly targeted noncombatants. Under a united Ireland, however, we will be more humane rulers than you ever were.

John: How can we believe that? Even under the Belfast Agreement of 1998, where great risks were taken by our community in an attempt to reach a solution, you have failed to disarm. You have failed to meet your promises of decommissioning.

Sean: There you go again with your red herring of decommissioning. We've now reached your excuse for not carrying out *your* obligations under the Good Friday Agreement. You never wanted true peace. You have always wanted to continue your domination. This fuss about decommissioning is your ploy to kill the power-sharing government that was set up.⁸⁹ The government that finally gave us a voice in our own land.

John: (turning to the others) Do you see why we cannot trust these people? For thirty years they shoot and maim innocent children and then, after compromise and risk-taking by the Unionist community, they won't recognize our legitimate fears that their weapons pose a threat to us.

⁸⁹ See EDITH SHILLUE, *PEACE COMES DROPPING SLOW: CONVERSATIONS IN NORTHERN IRELAND* 143–44 (2003).

Frank: But hasn't there been decommissioning? Hasn't General de Chastelain certified that the IRA has been putting its arms beyond use?

John: Even Tony Blair from a pro-Irish Labor Party no longer believes that. As he said a few months ago, the time for ambiguity is over. Sinn Fein loves to use ambiguity—promising one thing, taking what it wants, and then letting that promise disappear. These people don't understand the concept of a solemn contract.

Sean: Solemn contracts are a tool of the powerful to force the weak into bad bargains. Republicans will never again let the unionists or British make us weak.

John: How do you expect us to trust you if you don't honor your agreements?

Liam: Our party has always spoken out against violence. But I must agree with my republican friend here. All nationalists, including myself, realize that trust isn't built from the words of a contract. Perhaps the problem is that you English produce great lawyers while we Irish produce great poets. Trust is developed from the totality of living and working together. The Good Friday Agreement sets some basis for that. You have used decommissioning as a pretext to scuttle that Agreement. But the importance of the Agreement was not in its contractual nature. The importance of the Agreement is in the new order that it set up; an order for cooperation between communities in the six counties and an order for cooperation between the governments in Belfast and Dublin, and between this island and the island of Britain. It is only by allowing such relationships to develop and work that trust will be born.

Sean: When we talk about trust, what about 400 years of colonization, domination, and genocide? You have read about the Potato Famine.⁹⁰ You know of the summary executions during Easter

⁹⁰ See Christaldi, *supra* note 54, at 140. A potato blight followed by eviction, famine, and emigration struck Ireland in the late 1840s. Irish nationalists often claim that the British bear much blame for the suffering and death involved because of agricultural, trade, and land policies which exacerbated the plight of Irish peasants after disease devastated their basic source of food and income.

1916.⁹¹

Joseph: Do you intend to use history as a trump card in all moral debates? Can there ever be reconciliation in long-term conflicts, particularly where opposing groups share territory, if the group with better claim to historical injustice can ease its current burden to negotiate, and to act in good faith based on the historical wrongs done against it?⁹²

IX. GOOD FRIDAY AGREEMENT (DECOMMISSIONING EXCERPT)

All participants accordingly reaffirm their commitment to the total disarmament of all paramilitary organisations. They also confirm their intention to continue to work constructively and in good faith with the Independent Commission, and to use any influence they may have, to achieve the decommissioning of all paramilitary arms within two years following endorsement in referendums North and South of the agreement and in the context of the implementation of the overall settlement.⁹³

X. VOCABULARY AND AMBIGUITY: DECOMMISSIONING

As part of the peace process, all sides agreed that paramilitaries would give up their arms. The word for this has been “decommissioning.” Using that word seems to be something of a nod to the IRA’s take on the conflict—it was a conflict between militaries and hence a giving up of arms would be the decommissioning of an army. The actual process of decommissioning is probably the single greatest roadblock to further progress in the peace process. The IRA has been particularly slow in giving up its arms. In fact, its view of decommissioning is that its obligation, if any, is to put its armaments “beyond use.”⁹⁴ This throws another ambiguous phrase into the pot. It seems that the question of what constitutes beyond use and whether it really implies

⁹¹ See TOWNSHEND, *supra* note 38, at 76–81.

⁹² A “transitional justice” literature has emerged in recent years which, among other things, deals with the complexities of past wrongs and their weight in future reconciliation. See generally RUTI G. TEITEL, *TRANSITIONAL JUSTICE* (2000).

⁹³ THE AGREEMENT, *supra* note 1, at 20.

⁹⁴ DIXON, *supra* note 25, at 269–74; Stefan Wolff, *Introduction: From Sunningdale to Belfast, 1973–98*, in *PEACE AT LAST? THE IMPACT OF THE GOOD FRIDAY AGREEMENT ON NORTHERN IRELAND* 1, 13 (Jörg Neuheiser & Stefan Wolff eds., 2003); Stephen Farry, *The Morning After: An Alliance Perspective on the Agreement*, in *PEACE AT LAST? THE IMPACT OF THE GOOD FRIDAY AGREEMENT ON NORTHERN IRELAND*, *supra*, at 25, 36–39; Keenan, *supra* note 25; Sharrock & Jones, *supra* note 25.

the destruction or giving up of arms is open to much debate. The relationship between Sinn Fein, which is a party to the GFA, and its paramilitary counterpart, the IRA, casts further ambiguity into the situation. Sinn Fein somewhat acknowledges the link, but disclaims any power to dictate disarmament to the IRA.⁹⁵

XI. HISTORY 3

The British government, for decades following the 1921 partition, maintained a policy of non-interference in the domestic affairs of Northern Ireland.⁹⁶ This final factor in the Stormont formula assured that Protestant domination and discrimination against the Catholic community would not be challenged successfully. London subsidized the North with significant economic aid, but gave it a free hand in managing its political, economic, and social policies. Thus, for the half-century between the partition and the rise of the civil rights movement in Northern Ireland, Protestant unionists were able to totally dominate society behind a democratic façade.⁹⁷

From the 1920s through the 1950s, those forces that might have been expected to support greater equity for the nationalist community in the North were either absent or ineffective. First, the government in the South, while sympathetic to the northern Catholic community, was too busy struggling to get its own house into viable political and economic order. Parliamentary leaders of the Catholic community in the North were completely excluded from the halls of power for the reasons discussed above regarding the Stormont system. Militant republicans in the North, in the form of a periodically reincarnated IRA, lacked both internal and external support and were easily repressed by the Stormont establishment. Finally, potential external allies, such as Liberals and Laborites in Britain, were distracted during these decades by events in Europe leading up to, during, and after the Second World War.⁹⁸

The 1960s began to bring change. Catholics in the North noticed that they were not sharing in the prosperity of postwar recovery that characterized Britain in the 1950s and 1960s.⁹⁹ The civil rights movement for African-

⁹⁵ Gerry Moriarty, *SF is Willing to Find Accommodation on Arms*, IRISH TIMES, Mar. 22, 1999 at 7, available at LEXIS, News Library, Itimes File.

⁹⁶ DIXON, *supra* note 25, at 49.

⁹⁷ See HOLLIS, *supra* note 3, at 178–81; MCKITTRICK & MCVEA, *supra* note 4, at 21–29.

⁹⁸ See MCKITTRICK & MCVEA, *supra* note 4, at 21–29.

⁹⁹ See HOLLIS, *supra* note 3, at 179–80; THE OXFORD ILLUSTRATED HISTORY OF IRELAND, *supra* note 83, at 269–70.

Americans in the United States received worldwide attention and no doubt influenced Northern Irish Catholics who viewed themselves as excluded from society's benefits as black Americans. Furthermore, liberals and democratic socialists in Great Britain itself were finally prepared to support the cause of equality in one of their own provinces. Leaders like Bernadette Devlin, John Hume, and Gerry Fitt led peaceful protest marches in Londonderry, Belfast, and elsewhere, demanding fairer voting procedures (particularly one-person, one-vote), anti-discrimination laws, fairer housing, the repeal of special powers (that allowed, among other things, internment without trial), and the disbanding of the B Specials (a group of paramilitary police who had been especially harsh in its treatment of the Catholic community during times of tension).¹⁰⁰

In the 1960s, the Irish civil rights movement pursued its aims in a nonviolent manner, patterning itself after the American civil rights movement earlier in the decade.¹⁰¹ The Stormont government responded to a number of nonviolent demonstrations with significant force. Photos of bleeding heads and faces of demonstrators went out across the global news wires and reached periodicals and television screens. Substantial sympathy developed in Britain and the United States, where it was widely believed that the demonstrators were, after all, only demanding a fair share in what was supposed to be a democratic state.¹⁰² At this point, reunification with the South was not one of the demands of the movement. The Unionist government in the North badly miscalculated and overreacted to the civil rights movement. It miscalculated the degree to which the British government would tolerate such repression and also the effect that its intransigent insistence on holding onto its unequal prerogatives would have on the Catholic community.

By the early 1970s, the nationalist community in the North was heavily repoliticized. A new Social Democratic and Labor Party (SDLP), headed by Fitt and Hume, represented the constitutionalist reaction to the repression. The party gained widespread support in the nationalist community.¹⁰³ The repression of the civil rights movement in the North also catalyzed more radical republicanism. The IRA, long dormant and marginalized, became a significant factor again.¹⁰⁴ In one of its many rebirths and reformulations, the Provisional IRA (and its Sinn Féin political counterpart) emerged from a

¹⁰⁰ MCKITTRICK & MCVEA, *supra* note 4, at 36–40.

¹⁰¹ *Id.* at 40.

¹⁰² See O'BRIEN & O'BRIEN, *supra* note 13, at 169–72.

¹⁰³ See MCKITTRICK & MCVEA, *supra* note 4, at 64.

¹⁰⁴ *Id.* at 60–61.

doctrinal split in 1971 with the "Official IRA." The latter had become more and more Marxist through the 1960s, but perhaps, ironically, less confrontational. The Provisional IRA was not interested in leftist ideology but in republican militancy. The Provisional IRA or "Provos" became increasingly dominant, and as violence broke out in the North in the 1970s, became the main armed wing of Catholic paramilitarism.¹⁰⁵ (The present-day IRA and Sinn Fein descended from this Provisional wing.)¹⁰⁶

British troops were sent to Northern Ireland in 1969 to quell growing disturbances and violence between the nationalist civil rights movement and loyalist gangs, apparently supported by police and paramilitary police units such as the "B Specials." These troops were welcomed in the Catholic community. Nationalists initially viewed them as protectors against loyalist and government violence.¹⁰⁷ They were sent by a left-leaning labor government in London whose Home Secretary, James Callahan, was cheered when he first appeared in the Bogside Catholic neighborhood of Derry in 1969.¹⁰⁸ However, the situation for British soldiers deteriorated in the first couple years of their assignment in the North.¹⁰⁹ Loyalist and republican violence began breaking out on a regular basis. Targeting by both loyalists and republicans in their violent attacks was rather inaccurate and random with innocent civilians being killed on both sides. When the IRA began targeting the British army, the die was cast. British soldiers died at the hands of the IRA, and Catholics died at the hands of British soldiers. A few such incidents reversed the initial nationalist sympathy for the army. "Bloody Sunday" stands out as the most notorious of these incidents. British troops fired on a crowd of Catholic civil rights demonstrators in Derry on Sunday, January 30, 1972, killing 13 people and wounding 14.¹¹⁰ While British military spokesmen initially claimed that the troops were fired upon, subsequent investigation seems to indicate that the British Army fired its weapons without equivalent armed provocation from the nationalist side.¹¹¹

¹⁰⁵ See *id.*

¹⁰⁶ ENCYCLOPEDIA BRITANNICA ONLINE, *Sinn Fein* (2004), at <http://search.eb.com/eb/print?eu=69705> (last visited Oct. 25, 2004).

¹⁰⁷ See MCKITTRICK & MCVEA, *supra* note 4, at 55–56.

¹⁰⁸ DIXON, *supra* note 25, at 105–12.

¹⁰⁹ MCKITTRICK & MCVEA, *supra* note 4, at 61–65.

¹¹⁰ *Id.* at 76; DON MULLAN, BLOODY SUNDAY: MASSACRE IN NORTHERN IRELAND 11, 14 (1997).

¹¹¹ See MULLAN, *supra* note 110, at 11–12; MCKITTRICK & MCVEA, *supra* note 4, at 76–77; Jimmy Burns, *Army Chief Faces Renewed Bloody Sunday Allegations*, FIN. TIMES (LONDON), Oct. 7, 2003, at 6, available at LEXIS, News Library, Fintime File; Jim Dee, *Inquiry Opens in N. Ireland Into 1972 'Bloody Sunday' Massacre*, BOSTON HERALD,

Two decades of violence, with an alphabet soup of paramilitaries on both sides (the UDA, the UFF, the UPV, the UVF, the official IRA, the Provisional IRA, the real IRA, the INLA, and the continuity IRA), marked what became known as “the Troubles” in Northern Ireland.¹¹² At the beginning of this quarter-century of violence, there was a glimmer of hope that constitutional reform could avoid violent deterioration. The Sunningdale Agreement was a power-sharing compromise promoted by Great Britain and moderate forces from both communities in Northern Ireland, from which true reform would come to the government in Northern Ireland.¹¹³ Reforms in voting, discrimination law, housing, and policing were scheduled to take place in the early 1970s through the new Sunningdale system.¹¹⁴ However, just as this new power-sharing government was to go into effect in 1972, loyalists from the Protestant community successfully organized a general strike which shut down the economy in the North and forced the British to cancel the new governing arrangement and institute direct rule from London over Northern Ireland.¹¹⁵ While neither side was happy with direct rule, it was probably most offensive to the nationalist community, who had regarded Sunningdale as a way to at least begin the end of discrimination. More people died from politically-related violence in Northern Ireland in 1972 than in any other year of the Troubles, with almost 500 deaths among all sides.¹¹⁶ A cycle of radicalization, overreaction, and violence continued over twenty years after the failure of Sunningdale. One might speculate why the greatest

Mar. 28, 2000, at 7, available at LEXIS, News Library, Bherld File.

¹¹² See generally CAIN Web Service, Conflict and Politics in Northern Ireland (1968 to the Present), at <http://cain.ulst.ac.uk/> (last visited Oct. 25, 2004); Explanation Guide, The Troubles: Meaning, at <http://explanation-guide.info/meaning/The-Troubles.html> (last visited Oct. 25, 2004); Travel Through the Ireland Story, The Troubles, at <http://www.irelandstory.com> (last visited Oct. 25, 2004).

¹¹³ See Wolff, *supra* note 94, at 7–8, 20; Gerard Murray, *The Good Friday Agreement: An SDLP Analysis of the Northern Ireland Conflict*, in PEACE AT LAST? THE IMPACT OF THE GOOD FRIDAY AGREEMENT ON NORTHERN IRELAND, *supra* note 94, at 45, 48; TOWNSHEND, *supra* note 38, at 210–13.

¹¹⁴ MULLAN, *supra* note 110, at 11–30.

¹¹⁵ Whether the strike enjoyed broad support among all Protestants or primarily succeeded because of loyalist intimidation of its own community is debatable. See generally THOMAS HENNESSEY, THE NORTHERN IRELAND PEACE PROCESS ENDING THE TROUBLES? 10–18 (2001); Donald L. Horowitz, *The Northern Ireland Agreement: Clear Consociational, and Risky*, in NORTHERN IRELAND AND THE DIVIDED WORLD: THE NORTHERN IRELAND CONFLICT AND THE GOOD FRIDAY AGREEMENT IN COMPARATIVE PERSPECTIVE 89, 96, 98 (John McGarry ed., 2001); MCKITTRICK & MCVEA, *supra* note 4, at 107–17.

¹¹⁶ MCKITTRICK & MCVEA, *supra* note 4, at 76.

number of deaths occurred in the early years of the Troubles—outrage over internment without trial by government authorities, the failure of Sunningdale, the presence on the streets of hard-core paramilitarists who were gradually imprisoned in greater numbers, or a diminishing taste on the part of the general public for unwarranted violence—perhaps all of these helped to explain the downward trend in death as the Troubles dragged on.

The 1980s brought some changes both in tactics and in background reality. Republicans in prison used the hunger strike as a weapon to gain sympathy for their cause, both within their own nationalist community and in the wider world, with strong success in the former and mixed results in the latter.¹¹⁷ Republican militants outside the walls of the prisons began bombing targets on the British mainland, particularly those representing political authority and economic power.¹¹⁸ The British government itself evolved in its attitude toward Northern Ireland and began to accept the possibility that it not remain part of the United Kingdom forever.¹¹⁹ By the 1980s, the British government seemed to accept the notion that the majority of the population in Northern Ireland had a right to determine its future, and that future could include reunification with the South if democratically chosen. Enmity continued to fade between the Republic of Ireland and the United Kingdom, as both states seemed to agree that near-term peace was essential and that long-term political status was negotiable.¹²⁰ By the end of the decade, the demise of the Cold War, apartheid in South Africa, and Latin American dictatorships seemed to increase a global, psychological momentum toward settling previously intractable disputes, such as the one in Northern Ireland. Prosperity in the South militated in the same direction, tempting many northerners with the prospect of a peace dividend.¹²¹

The 1970s and 1980s were decades of the Troubles in Northern Ireland; nonetheless, the seeds of settlement were being quietly sown. Although bombings, internments, communal strife, hunger strikes, and the like garnered most of the publicity, foundations for peace were being laid both internally and externally. Concurrent with the start of the Troubles in the early 1970s, Britain and Ireland both joined the European Community.¹²²

¹¹⁷ *Id.* at 141–48.

¹¹⁸ *Id.* at 149–50.

¹¹⁹ Brian D. Vaughan, *Will God Save the Queen? Shared Authority and Sovereignty in Northern Ireland and the Case for Cross-Border Bodies*, 18 WIS. INT'L L.J. 511, 515 (2000).

¹²⁰ *Id.*

¹²¹ James J. Friedberg, Field Notes (1998, 2000) (on file with author).

¹²² ENCYCLOPEDIA OF THE EUROPEAN UNION 166 (Desmond Dinan ed., 2000) [hereinafter EUROPEAN UNION].

While such accessions had no visible immediate impact in lessening the discord and violence in Northern Ireland, they nonetheless set the stage for a cosmic change in attitude regarding nationalism, statehood, and the problems of partition. Ireland, which had stayed out of World War II and western coalitions against the Soviets (most notably NATO), was now part of a large, growing transnational organization that included its historical enemy, Britain. Changes on the ground often lead to changes in mentality. Furthermore, the type of organization that Ireland joined together turned out to be highly significant. The European Community (now the European Union), as mentioned in other parts of this work, constituted a new kind of international order¹²³—one in which state sovereignty became divisible. State members of the European Community gave up significant parts of their lawmaking and executing power to Community administration in Brussels. Presumably, neither British nor Irish leaders were thinking of the Northern Irish crisis at the time of accession into the Community; however, the significance of such accession must be regarded as a turning away from the exclusivist notion of a sovereign state. It is not much of a jump to argue that if Britain or Ireland could share sovereignty within a larger Europe, they could also share sovereignty in some way within Northern Ireland.

The accession to the European Community also had profound significance within the Irish Republic. After centuries of looking toward other continental powers as a counterweight to British domination (the Spanish, the French, and even the Germans), after centuries of failing in such attempts at shaking the British domination, the European Community offered a new and better solution. Whereas Irish nationalists had unsuccessfully sought liberation through military alliance with Spanish and French governments, economic alliance with Europe presented a more profound, lasting (and to Britain, less threatening) solution to the dilemma of dependence. Prior to membership in the Community, even though the Republic was politically independent, its economy was still tremendously dependent on its British neighbor to the east.¹²⁴ Culturally, Ireland had never fully emerged from the shadow of the former colonial power. However, by joining with Europe in the 1970s, Ireland had access to both economic and cultural independence through increased trade and the economic aid that flowed from the Community to poorer regions.¹²⁵ Ireland gradually increased both its economic product and its self-esteem. By the end of the two decades

¹²³ ENCYCLOPEDIA BRITANNICA ONLINE, *European Union*, at <http://search.eb.com/eb/print?eu=33850> (last visited Oct. 26, 2004).

¹²⁴ THE OXFORD ILLUSTRATED HISTORY OF IRELAND, *supra* note 83, at 259–60.

¹²⁵ See HOLLIS, *supra* note 3, at 189–98.

of the Troubles in the early 1990s, the Republic of Ireland had a per capita income roughly equal to that of the United Kingdom.¹²⁶ While Northern Ireland had stagnated because of civil strife and the decline of the rust belt industries, the Republic had prospered under the new order created by its relationship with Europe.¹²⁷ New prosperity led to a new mentality. No longer chafing under a British yoke, the Irish in the South could be more conciliatory in terms of settling age-old disputes with their neighbor.

Within Northern Ireland itself, even during the Troubles, some seeds of harmony began to be planted. In the 1970s, after numerous deaths in both Protestant and Catholic communities, a new peace movement started predominately by women gained prominence. Peace marches led by women from both communities were held to protest bombings and violence coming from republicans, loyalists, and the British military, and to demand that all parties cease their assaults on each other and on the civilian population. The women's marches got worldwide attention and two of the organizers received the Nobel Peace Prize.¹²⁸ While the movement lost momentum in the 1980s, the seeds of intercommunal cooperation had been sowed. Although violence continued, so did a growing opposition to it.

By the early 1990s, the pressure of public opinion, the desires of the Irish and British governments, as well as outside pressure from American and European governments, set the stage for parties in Northern Ireland to move toward ending the violence. Cease fires declared by the IRA and loyalist groups were usually observed, but sometimes violated.¹²⁹ Eventually, however, all major parties reached the peace table and negotiated the Good Friday Agreement.

¹²⁶ *Id.* at 193.

¹²⁷ Michael Busby, *Luck of the Irish: Ireland Has Become the Technological Wonderland of the European Union*, 11 CURRENTS INT'L TRADE L.J., Summer 2002, at 55, 56–59 (2002); Steve James, *Ireland: Social Tensions Deepen as the "Celtic Tiger" Staggers*, World Socialist Web Site, at <http://www.wsws.org/articles/2002/nov2002/ire-n07.shtml> (last visited Oct. 25, 2004).

¹²⁸ *The Nobel Peace Prize 1976*, Nobelprize.org, at <http://nobelprize.org/peace/laureates/1976/index.html> (last modified June 16, 2000) (last visited Oct. 25, 2004) (recognizing Betty Williams and Mairead Corrigan as recipients of one half of the Nobel Peace Prize for 1976; both were founders of the Northern Ireland Peace Movement, which was later renamed the Community of Peace People).

¹²⁹ Kieran McEvoy, *Prisoners, The Agreement, and the Political Character of the Northern Ireland Conflict*, 22 FORDHAM INT'L L.J. 1539, 1550–52 (1999).

XII. THE GOOD FRIDAY AGREEMENT (DECLARATION OF SUPPORT
EXCERPT)

1. We, the participants in the multi-party negotiations, believe that the agreement we have negotiated offers a truly historic opportunity for a new beginning.
2. The tragedies of the past have left a deep and profoundly regrettable legacy of suffering. We must never forget those who have died or been injured, and their families. But we can best honour them through a fresh start, in which we firmly dedicate ourselves to the achievement of reconciliation, tolerance, and mutual trust, and to the protection and vindication of the human rights of all.
3. We are committed to partnership, equality and mutual respect as the basis of relationships within Northern Ireland, between North and South, and between these islands.
4. We affirm our total and absolute commitment to exclusively democratic and peaceful means of resolving differences on political issues, and our opposition to any use or threat of force by others for any political purpose, whether in regard to this agreement or otherwise.
5. We acknowledge the substantial differences between our continuing, and equally legitimate, political aspirations. However, we will endeavour to strive in every practical way towards reconciliation and rapprochement within the framework of democratic and agreed arrangements. We pledge that we will, in good faith, work to ensure the success of each and every one of the arrangements to be established under this agreement. It is accepted that all of the institutional and constitutional arrangements—an Assembly in Northern Ireland, a North/South Ministerial Council, implementation bodies, a British-Irish Council and a British-Irish Intergovernmental Conference and any amendments to British Acts of Parliament and the Constitution of Ireland—are interlocking and interdependent and that in particular the functioning of the Assembly and the North/South Council are so closely inter-related that the success of each depends on that of the other.
6. Accordingly, in a spirit of concord, we strongly commend this agreement to the people, North and South, for their approval.¹³⁰

XIII. THE GOOD FRIDAY AGREEMENT (CONSTITUTIONAL ISSUES
EXCERPT)

1. The participants endorse the commitment made by the British and Irish Governments that, in a new British-Irish Agreement replacing the Anglo-Irish Agreement, they will:

¹³⁰ THE AGREEMENT, *supra* note 1, at 1.

- (i) recognise the legitimacy of whatever choice is freely exercised by a majority of the people of Northern Ireland with regard to its status, whether they prefer to continue to support the Union with Great Britain or a sovereign united Ireland;
 - (ii) recognise that it is for the people of the island of Ireland alone, by agreement between the two parts respectively and without external impediment, to exercise their right of self-determination on the basis of consent, freely and concurrently given, North and South, to bring about a united Ireland, if that is their wish, accepting that this right must be achieved and exercised with and subject to the agreement and consent of a majority of the people of Northern Ireland;
 - (iii) acknowledge that while a substantial section of the people in Northern Ireland share the legitimate wish of a majority of the people of the island of Ireland for a united Ireland, the present wish of a majority of the people of Northern Ireland, freely exercised and legitimate, is to maintain the Union and, accordingly, that Northern Ireland's status as part of the United Kingdom reflects and relies upon that wish; and that it would be wrong to make any change in the status of Northern Ireland save with the consent of a majority of its people;
 - (iv) affirm that if, in the future, the people of the island of Ireland exercise their right of self-determination on the basis set out in sections (i) and (ii) above to bring about a united Ireland, it will be a binding obligation on both Governments to introduce and support in their respective Parliaments legislation to give effect to that wish;
 - (v) affirm that whatever choice is freely exercised by a majority of the people of Northern Ireland, the power of the sovereign government with jurisdiction there shall be exercised with rigorous impartiality on behalf of all the people in the diversity of their identities and traditions and shall be founded on the principles of full respect for, and equality of, civil, political, social and cultural rights, of freedom from discrimination for all citizens, and of parity of esteem and of just and equal treatment for the identity, ethos, and aspirations of both communities;
 - (vi) recognise the birthright of all the people of Northern Ireland *to identify themselves* and be accepted *as Irish or British, or both*, as they may so choose, and accordingly confirm that their right to hold both British and Irish citizenship is accepted by both Governments and would not be affected by any future change in the status of Northern Ireland.
2. The participants also note that the two Governments have accordingly undertaken in the context of this comprehensive political agreement, to propose and support changes in, respectively, the Constitution of Ireland

and in British legislation relating to the constitutional status of Northern Ireland.¹³¹

XIV. VOCABULARY AND AMBIGUITY: UNIONIST AND LOYALIST

Like “nationalist,” “unionist” has both a broad and a narrow meaning. “Loyalists,” a radical subgroup within unionism, occupy a contrasting posture to their more moderate counterparts, just as republicans contrast themselves to moderate nationalists. When discussing the two predominant groups in conflict in Northern Ireland, “unionist” is used to refer to the Protestant community in the same way “nationalist” is used to describe the Catholic community. The term is somewhat preferred by those who feel that the conflict is not best set in religious terms but in political ones. A unionist favors the continued union with Great Britain within the United Kingdom of Great Britain and Northern Ireland. In its narrow sense, a unionist may be looked at in contrast to a loyalist, the other major segment of Northern Irish Protestant political opinion.

The ideological difference between loyalists and unionists is not as easily defined as that between republicans and constitutional nationalists. The loyalists are clearly more extreme and, like the Republicans, are willing to resort to violence. The defining characteristic of loyalism might be viewed as more visceral and less civic than unionism, namely loyalty to the monarchy and the crown, as opposed to the British political system. It should be noted that in the Fall elections of 2003, when the middle segment of the population lost ground in both communities to the extremes, it was a republican and a loyalist party, Sinn Fein and the Democratic Unionist Party (DUP) respectively, that gained ground against their constitutional nationalist and unionist counterparts, the SDLP and the UUP.¹³² Note the further ambiguity; the name of the loyalist DUP Party includes the word “unionist,” demonstrating again there is no firm and consistent logic to the ambiguous vocabulary that one must use to discuss the Northern Ireland conflict.

¹³¹ *Id.* at 2 (emphasis added).

¹³² Rosie Cowan, *Hardliners Gain in Ulster Poll*, GUARDIAN, Nov. 28, 2003, at 2, available at LEXIS, News Library, Guardn File; David McKittrick, *Ballots Replace Bullets on Ulster's Long Path to Peace*, INDEPENDENT, Nov. 26, 2003, at 12, available at LEXIS, News Library, Indpnt File; Nicholas Watt, *Impatient Blair Tells Sinn Fein to Shape Up: No. 10 Points Finger at IRA for DUP Election Success*, GUARDIAN, Dec. 17, 2003, at 10, available at LEXIS, News Library, Guardn File.

XV. ARTICLES 2 AND 3 OF THE CONSTITUTION OF IRELAND

Pre-Good Friday Agreement

Article 2

The national territory consists of the whole island of Ireland, its islands and the territorial seas.

Article 3

Pending the re-integration of the national territory, and without prejudice to the right of the Parliament and Government established by this Constitution to exercise jurisdiction over the whole of that territory, the laws enacted by that Parliament shall have the like area and extent of application as the laws of Saorstát Éireann and the like extra-territorial effect.¹³³

Post-Good Friday Agreement¹³⁴

Article 2

It is the entitlement and birthright of every person born in the island of Ireland, which includes its islands and seas, to be part of the Irish nation. That is also the entitlement of all persons otherwise qualified in accordance with law to be citizens of Ireland. Furthermore, the Irish nation cherishes its special affinity with people of Irish ancestry living abroad who share its cultural identity and heritage.

Article 3

1. It is the firm will of the Irish nation, in harmony and friendship, to unite all the people who share the territory of the island of Ireland, in all the diversity of their identities and traditions, recognising that a united Ireland shall be brought about only by peaceful means with the consent of a majority of the people, democratically expressed, in *both jurisdictions* in the island. Until then, the laws enacted by the Parliament established by this

¹³³ CONST. OF IRELAND, art. 2 & 3 (1937), at http://en.wikipedia.org/wiki/Articles_2_and_3_of_the_Constitution_of_Ireland (last visited Oct. 26, 2004); CONST. OF IRELAND, available at <http://www.maths.tcd.ie/pub/Constitution/Preamble.html> (last visited Oct. 26, 2004).

¹³⁴ Amendment 19 of the 1937 Constitution of Ireland replaced Articles 2 and 3 with new language, as mandated by Annex B to the "Constitution Issues" section of the GFA. See CONST. OF IRELAND, pt. II (Nineteenth Amendment of the Constitution Act, 1998), available at <http://www.gov.ie/bills28/acts/1998/a98-19am.pdf> (last visited Oct. 25, 2004).

Constitution shall have the like area and extent of application as the laws enacted by the Parliament that existed immediately before the coming into operation of this Constitution.

2. Institutions with executive powers and functions that are shared between those jurisdictions may be established by their respective responsible authorities for stated purposes and may exercise powers and functions in respect of all or any part of the island.¹³⁵

XVI. CONSTITUTIONS AND TRANSITION

Constitutional ambiguity weaves its way through both the problems of Northern Ireland and the potential solution. Rules found in constitutions or in constitution-like sources have sometimes impeded and sometimes facilitated the peace process. Elites tend to create and administer constitutions. Communities may need to oppose this tendency to allow for the benefits of an integrated dispute settlement.

In a rather unique situation, at least four constitutional jurisdictions intersect in Northern Ireland today—British, Irish, Northern Irish, and European. The latter can be viewed as two—European Union (EU) and European Convention on Human Rights (ECHR). This overlap recapitulates our themes of ambiguity, divisible sovereignty, and Europeanization.

Under nineteenth-century international legal positivist analysis, the United Kingdom would presently possess *exclusive* sovereignty over Northern Ireland. Most international institutions, from the U.N. down, operate under this assumption of undivided sovereignty—within their halls, the U.K. exclusively represents the people of Northern Ireland.¹³⁶ So, Northern Ireland shares whatever constitution governs the U.K. The ambiguity begins here, for the British Constitution does not exist on a single document.¹³⁷ Jurists have often described it as “unwritten,” but that is an oversimplification. While the overriding principle of parliamentary supremacy is sort of unwritten, the statutes enacted by Westminster pursuant to such supremacy are textual, and the most important of them function as basic law. (Furthermore, written texts such as the 1689 Bill of Rights, underlie the supremacy principle.) More accurately, we can say no single

¹³⁵ *Id.* (emphasis added). Had the amendment stated “each jurisdiction,” the commitment to unification by consent only would have been less ambiguous.

¹³⁶ *List of Member States*, United Nations, at <http://www.un.org/Overview/unmember.html> (last visited Oct. 26, 2004).

¹³⁷ Michael Burgess, *Constitutional Change in the United Kingdom: New Model or Mere Respray?*, 40 S. TEX. L. REV. 715, 717 (1999).

document contains the British Constitution and any ordinary parliamentary act can amend it—two qualities making Britain unique among industrial democracies.¹³⁸ Over the centuries, Parliament has enacted basic laws for the political structure and governance of Ireland or Northern Ireland, most recently pursuant to the GFA. One could claim with some force that such legislation was U.K.-based constitutional law.

Northern Ireland itself offers the second source of constitutional jurisdiction. Ambiguities operate here as well. If Westminster legislation forms its constitution, then the territory could be seen as merely a constituent unit of the British state, just as Ohio, California, or West Virginia are constituent units of the United States. Unlike U.S. states, however, neither the people of the territory nor their own legislature have produced such a local constitution.¹³⁹ The London parliament has provided the basic laws, and legislation from Stormont, when it met, was subsidiary.¹⁴⁰ An attempt at a cross-community negotiated constitution for the North failed in the late 1980s.¹⁴¹ Until the GFA in 1998, no constitutional structure existed at the Ulster level that challenged the reality of absolute sovereignty.

Of course, the Republic of Ireland also accepted the political notion of absolute sovereignty, but disputed the legitimate holder in the North. Prior to the GFA, the Irish Constitution asserted sovereignty over the whole island, thus presenting a second exclusivist vision to constitutional jurisdiction in the North, incompatible with the British and unionist vision.¹⁴² The GFA offered

¹³⁸ See Kieran McEvoy & John Morison, *Constitutional and Institutional Dimension: Beyond the "Constitutional Moment": Law, Transition, and Peacemaking in Northern Ireland*, 26 FORDHAM INT'L L.J. 961, 963–64 (2003); Sir Peter North, *The United Kingdom—An Era of Constitutional Change*, 2000 ST. LOUIS-WARSAW TRANSATLANTIC L.J. 99, 101–02 (2000); Vincent P. Pace, Note & Comment, *Partial Entrenchment of a Bill of Rights: The Canadian Model Offers a Viable Solution to the United Kingdom's Bill of Rights Debate*, 13 CONN. J. INT'L L. 149, 151 (1998).

¹³⁹ The 1921 Government of Ireland Act describes parts thereof as "Constitutional Northern Ireland." It, of course, is a statute from the British Parliament at Westminster. MCKITTRICK & MCVEA, *supra* note 4, at 4.

¹⁴⁰ MCKITTRICK & MCVEA, *supra* note 4, at 21–25.

¹⁴¹ Feargal Cochrane, *Unsung Heroes? The Role of Peace and Conflict Resolution Organizations in the Northern Ireland Conflict*, in NORTHERN IRELAND AND THE DIVIDED WORLD: THE NORTHERN IRELAND CONFLICT AND THE GOOD FRIDAY AGREEMENT IN COMPARATIVE PERSPECTIVE, *supra* note 115, at 137, 138–146; Martin Mansberg, *The Early Stages of the Irish Peace Process*, at <http://www.c-r.org/accord/ireland/accord8/early.shtml> (last visited Nov. 3, 2004).

¹⁴² See CONST. OF IRELAND, art. 2 (1937) (prior to 1998 Amendment), which reads, "Article 2 [Territory] The national territory consists of the whole island of Ireland, its islands[,] and the territorial seas."

a vision of peace based on shared sovereignty (in fact, if not in word). The Irish state and constitution had their own ambiguous evolutions. A Westminster parliamentary act created the Irish Free State as a British Empire dominion in 1921 (from the 26 counties of southern Ireland).¹⁴³ That state adopted its own written constitution in 1937, neither mentioning nor disclaiming Ireland's connection to the Empire and the Crown.¹⁴⁴ However, in 1949, the Dublin government declared the state a republic, breaking ties with the Crown.¹⁴⁵ Over three decades, the state centered in Dublin evolved from a product of British law and partition to a sovereign state whose constitution set up a legal claim to sovereignty incompatible with British sovereignty.

Europe appears as the fourth contestant for constitutional sovereignty in Northern Ireland. Unlike Britain and the Irish Republic, however, Europe's claim is neither exclusive nor explicitly articulated. Rather, it is functional and implicit—implicit in the reality of shared sovereignty that has evolved over the last half century through the law and practice of the EU, and to a narrower degree, the European Human Rights system. Each of these European entities possess a constitution-like document (the Treaty of Rome and the ECHR, respectively) that have gradually and ambiguously come to occupy domains of sovereignty at the expense of exclusivist statism.¹⁴⁶ Such occupancy helped prepare the ground for the GFA.

While both the Treaty of Rome and the ECHR operate at the international level to create state-to-state rights and obligations for the U.K. and Ireland, as well as for other state parties, unlike traditional treaties, they have also created rights and obligations for individuals.¹⁴⁷ European court rulings, whether from Strasbourg (ECHR) or Luxembourg (EU), supercede British and Irish law.¹⁴⁸ In this regard, we must at least consider whether they operate at the constitutional level. The ECHR has handed down numerous binding legal judgments arising from the Troubles in Northern

¹⁴³ Elizabeth Kondonijakos, *The Reasonable Suspicion Test of Northern Ireland's Emergency Legislation: A Violation of the European Convention of Human Rights*, 3 BUFF. J. INT'L L. 99, 102 (1996).

¹⁴⁴ HOLLIS, *supra* note 3, at 152.

¹⁴⁵ ENCYCLOPEDIA BRITANNICA, *supra* note 41, at 1015.

¹⁴⁶ See *Convention for the Protection of Human Rights and Fundamental Freedoms, as Amended by Protocol No. 11*, Council of Europe, available at <http://conventions.coe.int/treaty/en/Treaties/Word/005.doc> (last visited Oct. 26, 2004); *European Treaties*, Europa, at http://www.europa.eu.int/abc/treaties_en.htm (last visited Oct. 26, 2004).

¹⁴⁷ North, *supra* note 138, at 112–13.

¹⁴⁸ See *id.* at 112–14; Pace, *supra* note 138, at 158.

Ireland. The judgments have typically addressed charges against Britain of wrongful detention, penal treatment, and discrimination.¹⁴⁹ Under the Rome treaty, the EU has, at times, bypassed London and Dublin. For example, the EU has created regional programs on a supranational level, including designation of the entire island of Ireland as a single region for certain development purposes.¹⁵⁰ Furthermore, the EU has been a major factor in the economic emergence of Ireland. Europe now governs itself in many matters on a plane above the level of nation-state, a fact not unfelt in the construction of the GFA.

XVII. DIALOGUE 2

Joseph: Your problem is confusing the “nation” with the “state.” You are stuck in 1648—the Peace of Westphalia—when the princes of Europe established their independence from Pope and Emperor. Those princes—the Kings of France, England, and Sweden—ruled domains with some significant linguistic and ethnic distinctiveness and relative uniformity. These emerging “nation-states” were to dominate the world for three centuries. They claimed a “sovereignty” that their philosophers viewed as somehow “natural.” As more and more large ethnic groupings emerged from disunity or from their imperial yokes (the Serbs, the Bulgarians, the Italians), particularly in the nineteenth and early twentieth centuries, they each demanded a sovereign. Of course, the myth of the “ethnic nation” varied in its reality. Minorities within nation-states suffered because they were not sufficiently Serb, or Spanish, or Polish. The Irish “nation,” as much so as any, deserved a state of its own. In 1921, it was perhaps unfair that the nation only received three-quarters of one state, as its six northeastern counties were partitioned away. Even this was an ambiguous unfairness, since the majority in those counties preferred not to be part of an Irish nation-state. But in any event, today it should not matter. Today the nation-state is an anachronism just as surely as the Holy Roman Empire was an anachronism by 1648. The Republic and the six counties are each part of the European Union. Much of their economic life is not regulated separately from Dublin

¹⁴⁹ See, e.g., *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) at 45 (1981); *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) at 25 (1976).

¹⁵⁰ Tim O'Brien, *EU to Give EUR 180m to Revitalize Border Areas*, IRISH TIMES, Apr. 25, 2002, at 4, available at LEXIS, News Library, Itimes File; Paul Gillespie, *Dynamics of Devolution Raise Conflict for Blair*, IRISH TIMES, Feb. 20, 1999, at 13, available at LEXIS, News Library, Itimes File.

or Belfast, but from Brussels. The rights of their residents are protected from Strasbourg through the European Convention for Human Rights. In both economics and human rights, European law trumps local law. Students from the North and South study and travel throughout the continent and share multiple identities with their European counterparts. They are European as well as Irish, French, German, or Spanish. Under these circumstances, the Irish nation-state means much less than it would in 1920 or 1820.

Sean: What narrow-minded elitism. Take a walk around the Falls or the Bogside and ask the 19-year-olds about their identity. They're not damn Europeans. They're not university students reading poetry and sipping cappuccino. They couldn't tell you what goes on in Strasbourg or Brussels. More than likely, they're unemployed or working dead-end jobs. But they know they're Irish and their nation has been beaten down and its land occupied.

Joseph: But the point is that such an attitude will not bring peace. The "nation-state" perspective would doom the nationalist and unionist communities here to perpetual, irreconcilable conflict based on mutually exclusive interpretations of history and entitlement. When the Good Friday Agreement "recognise[d] the birthright of all the people of Northern Ireland to identify themselves and be accepted as Irish or British, or both"¹⁵¹ we finally got it right. And that conceptual breakthrough was premised on a world view that rejects the absolute sovereignty of the classical nation-state.

XVIII. SINN FEIN AND THE EU

Sinn Fein's¹⁵² significant discomfort with the European Union represents one of the more interesting takes on the issue of divisible sovereignty. Its posture makes it a bedfellow with groups on the opposite side of the political spectrum, notably Paisleyites and hardline British Conservatives. Ideologically, Sinn Fein's European plank does fit its historically political platform, even if constructed of old wood.

From the start of the Irish Civil War in 1920, radical republicans

¹⁵¹ THE AGREEMENT, *supra* note 1, at 2.

¹⁵² Here I mean the present incarnation of Sinn Fein, the political wing of what emerged in the 1970s as the Provisional IRA; each entity is now dominant in its respective sphere of republicanism—political and military.

distinguished themselves from other Irish nationalists by their uncompromising insistence on an Irish *nation-state* of 32 counties.¹⁵³ In fact, this insistence led to the Irish Civil War, fought not between Catholics and Protestants, but within the Catholic ranks. Although almost all nationalists opposed the partition of Ireland as a permanent situation, gradualists among them (sometimes called “constitutional nationalists”) led the 26 southern counties to autonomy from Britain by negotiating a peace treaty creating the Irish Free State (a dominion of the British Empire).¹⁵⁴ More radical nationalists, *i.e.*, republicans, rejected the Treaty and fought their countrymen in the South for two years in a futile effort to reject the treaty and partition.¹⁵⁵

For a decade, the rejectionists (loosely the IRA and Sinn Fein republicans) refused to participate in Irish government, North *or* South. Not only did they reject the Stormont Assembly in the Unionist North, but also the nationalist Dail in the Irish Free State.¹⁵⁶ They reasoned that even sitting in a nationalist legislature at Dublin was treasonous if it governed only 26 counties of a divided island. (Thus the IRA fought against both governments and was outlawed in both territories.) While some of the rejectionists (under the leadership of Eamon DeValera and the Fianna Fail Party) came to participate in and dominate government in the South starting in the early 1930s, more extreme elements, in the various incarnations of the IRA and Sinn Fein, continued to find parliamentary government treasonous, even in the republican South.¹⁵⁷ After decades of fighting for an all-island, Irish nation-state with full sovereignty in the Irish People, imagine the chagrin of Sinn Fein that with British resistance to unification forsworn in the Good Friday Agreement, unification might be possible—not of a fully sovereign nation-state, but of a territorial unit within an emerging European super state.

Sinn Fein’s position document makes all of the appropriate progressive democratic criticisms of the EU—bureaucratic arrogance, lack of democratic accountability, and too little parliamentary power. But these are criticisms of convenience. Were the EU to become an excellently democratic federation with a strong, elected parliament, separation of powers, a directly elected President, and a Bill of Rights, the IRA and Sinn Fein would still oppose it for the same reason their ideological forbearers opposed the Irish Free State;

¹⁵³ Mitchell McLaughlin, *Redefining Republicanism*, in CHANGING SHADES, *supra* note 29, at 41; Paul Arthur, *The Transformation of Republicanism*, in, CHANGING SHADES, *supra* note 29, at 84, 86 (emphasis added).

¹⁵⁴ See HOLLIS, *supra* note 3, at 131–35.

¹⁵⁵ HENNESSEY, *supra* note 50, at 166.

¹⁵⁶ BOYCE, *supra* note 40, at 328–29; Coakley, *Constitutional Innovation*, *supra* note 29, at 7.

¹⁵⁷ TOWNSHEND, *supra* note 38, at 108–44.

anything less than undivided sovereignty on an undivided island ruled by an Irish nationalist majority defeats the almost century-long aim of radical republicanism. Sinn Fein/IRA does not want to expel the British Army only to welcome EU directives. They not only oppose perceived oppression—they oppose shared sovereignty, even if shared democratically. Ultimately, the EU may threaten the IRA even more than the British Army, because it is harder to claim the moral high ground against a democratic federation than against a purported military occupation.

XIX. DIALOGUE 3

Liam: Europe has provided Northern Ireland with an exit from its Troubles. The advent of the European Union demonstrates that we don't have to choose between mutually exclusive identities. They are a bit ahead of us on this in the Republic. Watch young people, especially those in Dublin, Galway, and Cork. They share tastes and values with their counterparts in Paris, Heidelberg, and Seville. They still feel Irish, but also European. It is beginning to happen in Belfast and Derry as well. Our conflict has delayed it, but it is happening.

Once we recognize that we can hold plural identities, the avenue to coexistence between our communities is broader. As the Good Friday Agreement says, you can be Irish or British or *both*. In fact, we will evolve away from the sense of two communities to a spectrum of identities within an inclusive Irish nation.

Sean: Irish nation?! You betray the Irish nation with your elitist, idealistic Europeanism. An Irish *state*, a republic independent and governing our whole island, must constitute the essential core of our nationhood. Only a united republic can realize our right and aspiration to self-determination as a people. We are not about to sacrifice our sovereignty, at the point of hard won and bled for victory, to a new European superstate.

John: Why do your "people" have the right to self-determination and not mine? Unionists comprise a clear majority in Ulster and we reject unification with the republican South. My people choose to be British and our self-determination is as a part of the United Kingdom.

Sean: But your claim is illegitimate on two accounts. First, the natural unit for determining the people entitled to self-determination in this case

is the island of Ireland, not the two partitioned pieces of that island carved up by Britain in 1921. Your “Ulster” is not even the legitimate province of that name. Three of its Catholic counties were excluded at partition to assure a Protestant majority.

Second, your Unionist majority in the six counties descends from dispossession and theft. Your ancestors stole the land from its rightful Irish inhabitants under the swords of Cromwell and William of Orange. Your “Billy” wasn’t even a Brit—he was a bloody Dutchman. No moral claim to self-determination can be based on such a history.

John: You have no right to the moral high ground based on events from 300 and 400 years ago. Events, by the way, that are open to differing interpretations. Your deposed King James was no saint. Western civilization progressed with his defeat. In any event, such ancient history shouldn’t matter. The majority in Ulster has legitimated its claim to self-determination through centuries of toil on the land and in factories, and through dedication to place, family, and God. The fact that this continuity began with an event you don’t like is immaterial.

Liam: This disagreement between you makes my point. Under the exclusivist viewpoint which the two of you ironically share in your enmity, no solution exists. For each of you, sovereignty must be absolute. That can’t work if we are to stop the bloodletting on our island. Power must be shared, sovereignty divisible, and identity flexible all on the same piece of land. Most of Europe has learned to live this way, as must we.

Sean: When you say most of Europe, are you talking about Kosovo or maybe the Basque Country?

Liam: Those are exceptions, as you well know. Like Northern Ireland, they are situations where “nation” has too long been equated with “state.” So rather than coexisting and respecting each other’s national aspirations, the people there fight over who has a right to a state. Or at least, the extremists like you engage in such a struggle, often dragging a good part of the population along their sectarian paths.

Sean: You love to pin little labels—extremist, fanatic; I say principled and dedicated. Your compromising philosophy, your mish mash politics

lead to states like Yugoslavia, where nationality is repressed only to emerge in violent chaos. Your federalized European Union could turn out to be a huge, awful Yugoslavia.

Liam: Yugoslavia was a communist dictatorship for half a century. Its economy was strangled by debt. One nation, the Serbs, sought to dominate the others (or at least the Serbian leadership sought this). There is no comparison to the emerging multi-polar, prosperous, democratic Europe. Both nationalists and unionists on our island could be part of Europe, without sacrificing their identities.

Lou: I don't like to agree with republicans, but you're wrong and Sean over here is right. I don't want to be European any more than he does. I'm British and that's fine with me. He's also right that you intellectuals see principle and call it extremism. His principles are all wrong, but at least he has them. With you, it's all love and peace and we can all be everything, anything, or nothing—Irish, British, European, Martian, whatever. Nationhood means you've got a state—and if you're part of that state, you're loyal to its sovereign. I'm loyal to the British Crown, not to some bureaucrat in Brussels.

Liam: You've just illustrated the problem. Your idea of sovereignty is outdated and dangerous. It's outdated because today sovereignty is divisible. It's not the king or queen who holds it, but the people. And the people have given some of that power to London, Paris, Dublin, or Brussels. Your idea is dangerous because it guarantees conflicts. Indivisible sovereignty means winners and losers, winner take all, your king or mine. So we bomb each other's houses and pubs in Belfast and Derry over whose face should be on a postage stamp.

Liam: The European Union is the best thing to have happened to Ireland in over two centuries. Europe has given us economic independence from Great Britain and reinforced the political independence of the Republic. It has done for Ireland through peaceful evolution what patriots falsely had hoped Spain or France (or even Germany) could do through military coalition.

Sean: You would sacrifice Ireland's independence to your ideal of Europe. We haven't fought for hundreds of years for an independent Irish

state just to have it rendered meaningless by ceding its sovereignty to a Brussels-based bureaucracy.

Liam: Do you realize that you sound like the reactionaries in the British Tory Party? You align yourself with the forces of yesterday when you hardheadedly oppose the European Union. Development aid from Brussels and trade with our European partners has enabled the Republic to raise its living standards beyond that of Great Britain. After centuries of domination, isn't that amazing? You have fought so long and fanatically for an Irish state that you lose sight of what is good for the Irish nation.

Sean: The Irish nation must be the Irish state. Isn't that what decades of struggle have been all about? Isn't that what our fathers and grandfathers and their fathers before them shed their blood for?

Liam: You are too ready to shed blood—that of your comrades' and that of your perceived enemies as well. The nation and the state are two different things. We share your longing for a unified Ireland—but it can exist in a larger Europe. In fact, it is a larger Europe that makes a unified Ireland more of a possibility.

Sean: That's double talk, double think.

Liam: No, it's creative, forward thinking. It is the thinking of reasonable people willing to compromise. It recognizes that the existence of the European human rights system and the existence of the European Union render old ideas of absolute sovereignty meaningless. It makes it possible for Catholics and Protestants to coexist in Northern Ireland without either feeling like a disenfranchised minority. The Good Friday Agreement would not have been possible without this network of reciprocal human rights protections and divisible, shared sovereignty made real by the European Union and its member states.

Sean: Republicans haven't fought for a united Ireland for seventy years just to have it taken away by your fuzzy political science, by your European Union.

Liam: You are like a child who is screaming because he cannot get what he wants. Absolute sovereignty is something of bygone ages. You oppose the European Union notwithstanding all the good that it has

done for the Republic and the potential good that it offers to Northern Ireland and the prospect that it offers for the greater likelihood of unification. You oppose it because it denies the absolute nature of the nation-state. That state has been the core of your inflexible ideology that has justified bloodshed for fifty years.

XX. BELFAST

On a gray day in December 1998, a taxi driver named Patrick (really) took me on a tour of East and West Belfast. East Belfast is predominantly Protestant whereas West Belfast is predominately Catholic (except for the Shankill Road district). East Belfast looks quite prosperous and well-maintained. There are large suburban-looking Tudor homes mingled with more modest, but still comfortable brick semi-detached houses. No political murals grace this neighborhood except for those in one less affluent section of row houses on a predominately Catholic street.

East Belfast is literally the other side of the tracks, under a railroad bridge and beyond it. The neighborhood mostly still appears solid and tidy, if the housing is somewhat modest. Even the Falls does not look slummy or dangerous, just a bit run-down. The Falls and Shankill Road are respectfully the Catholic and Protestant strongholds of republicanism and loyalism in working class West Belfast. East Belfast contains a good bit of well-kept "council housing." This is state-supported public housing, but it appears better maintained than most "projects" in U.S. cities. In these poorer Belfast neighborhoods, murals are a common sight on the sides of buildings. They are more prevalent in nationalist areas (Patrick's word for Catholic). The wall murals are explicitly pro-IRA and anti-RUC, not merely in the Falls, but in many of the Catholic neighborhoods in West Belfast.

The Shankill Road is a Protestant enclave in a mostly Catholic West Belfast. It looks like any other English high street shopping district, with numerous small retail establishments, pubs, etc. However, less than a block off the main road are hard-core political murals a bit shocking in their militancy. Black-hooded loyalist paramilitary figures threateningly hold guns in these building-side cartoons. The murals in the Falls are similarly strident in their republican message, but perhaps not quite as menacing in their visual tone.

As our tour progressed, Patrick gradually revealed himself as a republican. He agreed that all republicans are nationalists, but not that all nationalists are republicans. Saying that, he further noted that the definitions are fuzzy. Generally, nationalists favor a united Ireland while republicans favor forcing the British out as the only means to that end. He added though,

that today most republicans believe that a political solution is possible. It took Patrick about twenty minutes to open up to me, probably waiting to assure himself that speaking with me could be in no way threatening. He felt that the working class understood and accepted Europe's role in opening up possibilities of mixed sovereignty. A further point of interest was his thoughts on the Irish role in the United States. He expressed pride in such Scotch-Irish notables as Davy Crockett, Daniel Boone, various signers of the Declaration of Independence, and U.S. presidents. Patrick seemed to be a hopeful example of the republican man on the street made optimistic and moderate by the advent of a peace settlement, but optimism was a more common currency in 1998 than today.¹⁵⁸

XXI. VOCABULARY AND AMBIGUITY: NATION, BRITISH, IRISH

There are both broad and narrow definitions of nation. Does the Irish nation include only those of Irish-Catholic, Gaelic background, or does it include all those who live on the island of Ireland? A narrow, ethnic definition of "nation" makes dispute settlement more difficult in places like Ireland and the former Yugoslavia. The broader definition of nation is less conflict-laden. When one "nation" under the narrow, ethnic definition shares territory with another, and such group feels a right to have its own state, conflict is unavoidable.

On the island of Britain, ironically, very few people identify themselves as British. Their self-identified nationality is usually English, Scottish, or Welsh. Protestants in Northern Ireland on the other hand often do assert "Britishness" as their national identity to distinguish themselves from the Catholic-Irish.

Irish is the legal status of citizens of the Republic of Ireland. It is the identity claimed by most Catholic residents in Northern Ireland. It is also the ethnic identity of a vast number of emigrants from Ireland who have settled in other lands such as America, Canada, and Australia. Finally, some members of the Protestant community in Northern Ireland would consider themselves Irish, although this identification has decreased during the decades of the Troubles.

XXII. THE GOOD FRIDAY AGREEMENT (HUMAN RIGHTS EXCERPT)

1. The parties affirm their commitment to the mutual respect, the civil rights and the religious liberties of everyone in the community. Against the background of the recent history of communal conflict, the parties affirm

¹⁵⁸ James J. Friedberg, Field Notes (Dec. 1998) (on file with author).

in particular:

- the right of free political thought;
- the right to freedom and expression of religion;
- the right to pursue democratically national and political aspirations;
- the right to seek constitutional change by peaceful and legitimate means;
- the right to freely choose one's place of residence;
- the right to equal opportunity in all social and economic activity, regardless of class, creed, disability, gender or ethnicity;
- the right to freedom from sectarian harassment; and
- the right of women to full and equal political participation.¹⁵⁹

XXIII. EUROPE, HUMAN RIGHTS, AND IRELAND

European democracies formed the Council of Europe shortly after the end of the Second World War.¹⁶⁰ While the Council has pursued many broad purposes toward European peace, unity, and material betterment, the European Convention for Human Rights (ECHR) and the system for enforcing the Convention have been its dominant achievements.¹⁶¹ Although the European Union has displaced the Council as the main engine of European integration, the Council's human rights system, based in Strasbourg, has played a significant integrating role for the continent. To the extent that human rights have been an important and effective tool in implementing and defining limitations on the sovereign state for the protection of inhabitants' rights, the Strasbourg system of the Council of Europe, not the Brussels system of the EU, has fulfilled this function more strongly. Membership in the Council of Europe has been broader than that in the European Union from the inception of both organizations.¹⁶² Essentially any European democracy may join the Council without regard to the complex economic hurdles facing EU applicants. For instance, the new democracies of Eastern Europe almost immediately joined the Council after their communist governments fell. Their accession to the European Union,

¹⁵⁹ THE AGREEMENT, *supra* note 1, at 16.

¹⁶⁰ EUROPEAN UNION, *supra* note 122, at 101–02.

¹⁶¹ MARK W. JANIS & RICHARD S. KAY, EUROPEAN HUMAN RIGHTS LAW 22–33, 83–85 (1990).

¹⁶² Terminology becomes torturous for the uninitiated. The forty-member “Council of Europe” should not be confused with the EU bodies, the “Council of the European Communities” and the “European Council.” All fifteen members of the EU are also members of the Council of Europe.

however, has been a more arduous task requiring significant economic and legal reform and development.¹⁶³ The Council has never claimed to be anything other than an international body, that is an organization of states acting independently, whereas the European Union has progressively, though ambiguously, sought greater unity through the reduction of state prerogative. Nonetheless, the Council's human rights system also has reduced substantially unfettered state prerogative and hence sovereignty.

Britain and Ireland have been members of the Council of Europe and parties to the European Convention for Human Rights from their inception.¹⁶⁴ However, because of their domestic legal systems, each nation has been an imperfect enforcer of European human rights. The rights of the ECHR are treaty-based obligations that bind each signatory party to each other party. The natural persons within their jurisdictions are the beneficiaries of these rights. However, the United Kingdom and the Republic of Ireland, unlike most other European states, do not have legal systems that recognize the direct effect of international treaty law.¹⁶⁵ Therefore, until recently, people within British or Irish jurisdictions could not raise violations of European human rights in British or Irish courts. Even though Britain or Ireland may have violated international law by breaching their human rights treaty obligations, their legal systems did not recognize such treaty breaches as prohibited by national law. The peace process in Northern Ireland has promoted greater enforceability of these norms in the Irish and British legal systems. The Good Friday Agreement included within its web of interstate and intercommunity obligations a commitment to human rights protection that would be mutually enforceable throughout the British and Irish Isles. Negotiators undoubtedly saw this element of the Agreement as necessary to protect current and potential minorities, whether Irish, British, Protestant, or Catholic, in any of the jurisdictional territories. The ancillary benefit is increased human rights protection for all people in Britain and Ireland.¹⁶⁶

The denial of human rights figured importantly in the development of the conflict in Northern Ireland in the latter half of the twentieth century. As discussed above, during the 1960s, activists in Derry, Belfast, and elsewhere

¹⁶³ Nine of these former communist states are scheduled to join the EU in 2004, more than a decade after they became members of the Council of Europe. *See generally Lockheed Wins \$3.5 Billion Poland Plane Pact*, CHI. TRI., Dec. 27, 2002, at 3; *The World; With an Eye on EU, Slovaks Elect Moderate*, L.A. TIMES, Apr. 18, 2004, at 6.

¹⁶⁴ JANIS & KAY, *supra* note 161, at 1.

¹⁶⁵ *Id.* at 34–35.

¹⁶⁶ Northern Ireland Act 1998, ch. 47, § 69 (Eng.) (stating that the function of the Northern Ireland Human Rights commission is to review adequacy and effectiveness of Northern Ireland law protecting human rights).

started a civil rights movement, demanding an end to discriminatory treatment of the Catholic community. Their complaints related to such areas as employment, housing, education, and policing. This predominately peaceful movement met with resistance from Protestant establishment in the North. Radicalization on both sides followed with violence. British military intervention, initially welcomed by Catholics, proved unsuccessful in stemming the violence and came to be perceived by the Catholic community as occupation. The overwhelmingly Protestant composition of the police force (Royal Ulster Constabulary) reinforced this perception, since British troops often supported the police.¹⁶⁷

In addition to the initial civil rights issues raised by the early protestors, new human rights issues came to the fore in light of British military and policing activities. Investigations over the years have indeed demonstrated that there were significant instances of human rights violations by the British, as well as by paramilitary groups, in both the Catholic and Protestant communities. A number of cases relating to the Troubles in Northern Ireland found their way to the Commission and Court on Human Rights in Strasbourg.¹⁶⁸

For over three decades, Irish republicans have brought suits against the British government principally challenging detentions and conditions of confinement and interrogation growing out of the conflict in Northern Ireland. In doing so, republicans have invoked various protections of the treaty, principally those related to life, liberty, due process, privacy, search and seizure, and cruel and inhumane treatment. In fact, the Troubles have probably been the single largest source for cases and controversies coming before the Strasbourg court. While the majority of individual counts brought against the U.K. have probably not been successful, the court has found against Britain on a sufficient number of claims that one must believe government behavior has been moderated by the presence of such cases. Furthermore, this jurisprudence undoubtedly was in the negotiation consciousness of the parties, who struggled with each other to craft the Good Friday Agreement, particularly its human rights guarantees.

Subsequent to the Good Friday Agreement, both Britain and Ireland passed legislation to meet their obligations to incorporate ECHR norms into the domestic law of Northern Ireland¹⁶⁹ and the Republic¹⁷⁰ so that

¹⁶⁷ HOLLIS, *supra* note 3, at 198–204.

¹⁶⁸ FREDE CASTBERG, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 33 (Torkel Opsahl & Thomas Ouchterlony eds., 1974).

¹⁶⁹ Human Rights Act 1998, 2000, ch. 42 (Eng.) (extending rights granted by the GFA not only to Northern Ireland, but also to the entire United Kingdom).

individuals could rely on such protections in local courts.

Human rights have been a chief tool in dividing and limiting sovereignty since the end of World War II. The Nuremberg trials, the Universal Declaration, the U.N. Covenants, and the European Convention system have all played this role to some degree. Events in Northern Ireland and the peace process are among the most recent circumstances exemplifying this phenomenon.

XXIV. VOCABULARY AND AMBIGUITY: RUC

RUC was the name of the Northern Irish police force prior to November 4, 2001.¹⁷¹ It stood for Royal Ulster Constabulary. While technically open to Catholics, for most of the decades since the partition, it was overwhelmingly Protestant. The issue of policing has been a major one in resolving the conflict in Northern Ireland. As part of the present peace process, the name Royal Ulster Constabulary has been changed to the Police Service of Northern Ireland.¹⁷² Nationalists objected to the old name, certainly because the word Royal implies a Unionist or Loyalist bent in the institution and possibly also because of the use or misuse of the word "Ulster."

XXV. BORDER

Unionists and British will refer to the boundary between Northern Ireland and the Republic of Ireland as the border. On most international maps it is treated as a border, an international boundary between the state of the United Kingdom and the state of the Republic of Ireland. Since nationalists do not recognize the legitimacy of British sovereignty in Northern Ireland, they will not use the term border to refer to the boundary between the two entities.

XXVI. A DAY WITH TOM

In July 2003, I spent a day in Coleraine. The town is situated on an inlet of the northern coast about midway between Derry and Belfast. Thomas Phillips¹⁷³ teaches at the University of Ulster at Coleraine, specializing in the

¹⁷⁰ Carol Coulter, *Human Rights Convention Passes Into Law*, IRISH TIMES, Jan. 6, 2004, at 7, available at LEXIS, News Library, Itimes File.

¹⁷¹ About PSNI, Police Service of Northern Ireland, available at http://www.psni.police.uk/index/about_psni.htm (last visited Oct. 26, 2004).

¹⁷² *Id.*

¹⁷³ A pseudonym.

non-profit sector. Thus, his expertise comprises detailed knowledge of those social and civic organizations that often are key players in building civil society, enabling democratic transition and communal reconciliation. We discussed such matters, but our conversation wandered much further afield, as he hosted me for the day, guiding me around his beautiful corner of Ireland. Tom's views appeared balanced and tolerant, and not sectarian.

The Unionist government was located in the new University of Ulster, in the small market town of Coleraine in 1964 during the days of the old Stormont system of Protestant political advantage. Northern Ireland's capital and largest city, Belfast, already had been the seat of Queens University for many decades. Derry is the second largest city in Northern Ireland, and the majority of its population is Catholic. Coleraine is predominantly Protestant. Thus, critics have charged that the siting of this second university for Northern Ireland reflected government favoritism toward the Protestant community.

As we drove through a pleasant seaside town not far from the famous Giants' Causeway,¹⁷⁴ my host pointed out political symbols I would have otherwise taken for festive street decoration. Colorful banners flew from utility poles along the seaside promenade. Tom explained that they were loyalist emblems, unlawfully displayed on public municipal property, but countenanced in the face of loyalist militancy by timid (or sympathetic) local officials. Earlier, as we had driven through a public housing estate, he did not need to point out to me the proliferation of Union Jacks, further loyalist banners, and militant graffiti. He obviously thought the tour of such an area would be educational (although I had seen such displays previously in both republican and loyalist enclaves in Belfast and Derry). He revealed disapproval of this culture of extremism.

Thus, my colleague's credibility was high with me, when he explained what a serious issue decommissioning was to the Protestant community. In contrast, a few days earlier, a law professor in Galway (an American, but working in Ireland) accepted the Sinn Fein argument when she insisted to me that decommissioning was a red herring, thrown across the road by obstructionist unionists who never wanted power-sharing in the first place and were pleased to find an excuse to block a cross-community government.¹⁷⁵ Later that week in Belfast, another academic, who was also

¹⁷⁴ The Giants' Causeway is a breathtaking formation of boulders, breakers, and outcroppings along the seacoast.

¹⁷⁵ She also had insisted that the self-determination concession to the people of Ireland, not decommissioning, was the crucial clause since it kept Sinn Fein in the Agreement.

sympathetic to the nationalist community, echoed the same skepticism. Her skepticism seemed as sincere as Tom's concern. However, I believed Tom when he insisted that for Protestants, IRA weapons raised a real issue. Furthermore, the IRA's game of hide and seek, salted with ambiguous concepts like "beyond use," bred sincere mistrust. Ironically, half a year later, Tony Blair reversed his position, in frustration with the IRA, and declared, "There was a time in Northern Ireland when ambiguity was a necessary friend. It is now an enemy, an opponent, of this process working." He cited the IRA's failure to disarm and renounce violence as the single biggest obstacle to peace, in the wake of the electoral success of hardline parties from both communities at the expense of both nationalist and unionist moderates.¹⁷⁶

The British government has now acknowledged what Tom quietly told me last summer—trust is a very real reconciliation issue here, and for the unionist community, IRA disarmament and clarity of commitment must replace ambiguity and contingent reassurances.

XXVII. DIALOGUE 4

Lou: The parades celebrate our culture and history. William of Orange freed the British Isles from Stuart dictatorship. His victories over James made it possible for parliamentary democracy to triumph. We have every reason to remember and honor these profound historic events.

Liam: The truest word in your little speech was "triumph." The Orange Order parades, the Apprentice Boys' march represent triumphalism more than anything else. They are the boot on the neck. Parliamentary democracy's got nothing to do with it, domination's everything. With every drum beat, every bagpipe note, you celebrate the domination of the Protestant community over the Catholics, the theft of our land, and the exile of our people.

Lou: Every credible historic account recognizes that the Glorious Revolution of 1689, when the parliamentarians under William defeated the Stuart tyrants, was a major step toward a democratic and modern western civilization. However, even if you insist on denying this historical truth, what right have you to prevent me from expressing it? You, who have whined for decades about purported

¹⁷⁶ See *supra* note 3 and accompanying text.

denial of your civil rights, now seek to limit my basic freedom of expression.

Liam: But you want to express yourself in my front yard. It is like burning a cross in my garden. Your marches route through Catholic neighborhoods. Your drums and bugles and shouts taunt with bad music and worse, history. That's not free expression. That's incitement.

Mary: I have no wish to move either of you away from your core beliefs. Or perhaps I do; but I know it would be fruitless to start with such an attempt. It is better if we can at least agree that we don't want our young men killing each other and don't want our pubs and homes fire-bombed. If the parades are to go forward, let's at least keep them from destroying our towns and cities.

Lou: How would you propose that? It's the republican kids that start the trouble—throwing stones while we are peaceably marching.

Mary: I have to agree with Liam on one point. You cross a line at some point between expression and provocation. Let me propose some limited rules that would protect the former and prevent the latter. Paraders should have the freedom to march, but the communities should engage in negotiation concerning certain details.

Liam: That is what we have been asking. They shouldn't be allowed to march past Catholic neighborhoods.

Mary: That might be possible in some circumstances, but where our communities are back-to-back with each other, it is not always. However, we know there are certain symbols, particular flags and songs, that are the most triumphalist. Generally, the police must protect the parades, but there may be particular junctures where, by mutual agreement, these most provocative gestures are withheld. Reciprocally, the nationalist community must agree to control its young people—no stones, no curses, no threatening surges against police lines. People of good faith and peace must meet and agree on these rules beforehand. We must be in the crowds together making sure they are followed. We don't have to agree on a united Ireland or a divided one in order to agree that bricks and flames are bad for all of us.

XXVIII. A DAY IN DERRY¹⁷⁷

Bus coaches from all over Northern Ireland (and a few from Scotland) roll into Derry in early August for the Apprentice Boys' march. The bands further parade at their home locations before and after this event. In the year 2000, I spent the day observing this parade, hosted by Dominic Bryan, a lecturer at Queen's University in Belfast and an expert on parades and their accompanying political and social issues in Northern Ireland. The Apprentice Boys' parades are distinct from those of the Orange Order. While both organizations are Protestant, loyalist, and fraternal groups, the Apprentice Boys seem to have evolved into a slightly less strident organization than the Orange Order.

The Apprentice Boys have made some effort to compromise and stage peaceful events. Their parades are linked to a single historical event: the semi-mythical closing of the gates of Derry by Protestant teenage guild apprentices just in time to avoid the approaching onslaught of Catholic troops under King James. Reciprocally, Derry Catholics, now being a majority, may feel less threatened and themselves more willing to reach accommodation with the loyalist marchers in order to avoid bloodshed.

Dominic Bryan, who has written extensively on parades (often with colleague Neil Jarman), has been consulted by the British government and has been involved in the training of parade marshals for the Apprentice Boys' event. He and Jarman came up with the idea of marshals/observers, drawing on the practice of t-shirted security folk at rock concerts. Dominic's Ph.D. is in anthropology. His political interest is in "measured and sensible" policing. Dominic and I met at an appointed street corner in Derry early in the morning before commencement of the parade. The first official event to take place in the old city was an early morning pageant. After the pageant, participants proceeded to march around the wall. The pageant reenacted the siege of Derry in 1689, with Williamite Protestants holding out against the massed forces of James' army. Dominic offered his opinion that the recent addition of the theatrical pageant is a good thing because it makes the day less militaristic and more commemorative. Perhaps the worst thing about the pageant was the horrendous acting and embarrassing amateurism.

The march around the wall has been contentious in the past, especially on the Bogside portion, where Catholic residents have rioted in earlier years. Dominic expressed optimism that the compromise negotiations should help

¹⁷⁷ Friedberg, *supra* note 121. The information in this section comes from direct observation of the August 12, 2000, Apprentice Boys' march or from conversations with Dominic Bryan.

preserve the peace. Today, a Catholic population overwhelmingly dominates the Derry side of the river, which includes the old walled city where most parade events are held. The walled city has few Protestant residents. The area has turned mostly commercial and seems to be busy primarily during the day. According to Dominic, a number of Protestant institutions, such as churches, pubs, and fraternal buildings, have survived within the old city walls. Most Protestants live south of the river where the parade begins and ends. Over one hundred forty bands and marchers proceed from there to the "diamond," the central square in the old city, and then back to the bridge. The main parade, with bands, takes about four hours, between noon and 4:00 p.m.

Dominic greets many contacts as we move through the streets—from the Parade's Commission to fellow academics and community people. They tend to be conciliatory, pro-peace types, both Catholic and Protestant. (Dominic himself is English, but Catholic.)

A friend of Dominic, a social psychologist named Cliff, spends the day with us. Cliff grew up and lives in Omagh. During a break over coffee at a bakery on Waterloo Street, Cliff talks to me about the Omagh bombing a year or so before by the splinter republican group, the "Real IRA." Everyone at the table agrees that the Omagh tragedy consolidated (or affirmed) a clear anti-violence majority throughout Northern Ireland. Cliff speaks of being on a bus going home to Omagh at the time of the bombing and of seeing police crying at the bus station.

During the same conversation over coffee, Dominic relates a joke told to him by a South African Jewish friend saying that the three political situations are like three marriages. In South Africa the spouse dies, in Israel and Palestine the couple gets a divorce, and in Northern Ireland, the couple undergoes eternal marriage counseling.

After coffee, we walked to the bridge to catch the beginning of the parade. More spectators have now filled the streets by late morning, conveying a holiday atmosphere. We walk along with the early bands through the city to the diamond, in which the atmosphere becomes tenser, but still orderly for the most part. Lots of police are in sight, most are not armed or armored. However, after the accumulation of a number of nationalist youths, special police in riot gear, though without helmets or shields, do appear. Over a couple of hours spent at the diamond, nothing serious occurs, though we do observe a few small incidents. A nationalist teenage girl will not move off a barrier when asked to do so by a woman police officer. As soon as couple of large, male cops approach her, however, she jumps right off. When nationalist kids seem to surge a bit, police react by moving personnel and blocking the migration of the group. Dominic says the adults in the nationalist community seem to be following the agreement to not

disturb the march. Some, in fact, are actively calming their own angry youths. We seem to be stationed at the edge of two groups, republican and loyalist. A few loyalist women come on to sing some rather aesthetically unpleasing marshal songs for a few minutes. The only minor violence we observe occurs near the end. Protestant paraders from Portadown play music in the diamond, apparently against the rules of negotiated compromise. A bottle is thrown at the band from the nationalist crowd. Some members surge to fight, while the police and others in the band restrain them. The result is just a couple of minor scuffles. After the march, we relax in a pub with seven or eight others, mostly observers of the parade like Dominic. Everyone seems pleased that the negotiated cross-community work seems to have resulted in a violence-free day.

XXIX. VOCABULARY AND AMBIGUITY: DERRY/LONDONDERRY

Catholics call the second largest city in Northern Ireland "Derry." The official name within the United Kingdom is Londonderry. The longer name reflects a connection that the Protestants settlers and residents of the town feel toward the British Empire.

XXX. DERRY

Tuesday night, July 29, 2003

The streets of central Derry, particularly inside the old city walls, are almost totally deserted at night. Although there are a lot of shops, restaurants, and commercial activities during the day, nothing is happening in the evening except for inside a few pubs. In the Catholic neighborhood just outside the walls of the city, the shops within the walls seem uniformly closed, except for a few pubs along the strip that is the commercial area above the Bogside. Earlier, I searched for the Italian restaurant that I had eaten at a few years earlier on a block just outside the walls, pretty much on the opposite side from the Bogside. I found it. I talked to the proprietor who had moved from Abruzzi about eight or nine years ago. He said he came to Derry after the 1994 truce, apparently anticipating an upturn in the economy and demand for fine restaurants. He observed that the economy has improved in the last few years due to the peace, notwithstanding the non-functioning of the Stormont legislature; apparently the peace process is having positive economic effects if this restaurateur is to be believed. He also indicates that a big difference is that people up here are willing to work harder now; they used to be just seeking handouts from the government. One does not know to what extent this is accurate or just the skewed perception of a small

businessman who does not believe anybody in the world works as hard as small businessmen.

XXXI. VOCABULARY AND AMBIGUITY: WAR

The Irish Republican Army insists that its actions of violence in Northern Ireland are those of a war. In their view, this is a war against the British Army. They ignore, however, certain legal characteristics of war in making such a claim, such as the limits on warfare placed by the Geneva Conventions, which have been signed by almost all the nations of the world and have become customary law. Under the Geneva Conventions, the attacks carried on by the IRA, as well as those carried on by the Protestant Loyalists militias, would clearly be illegal under international law.¹⁷⁸ Thus, the perpetrators of acts such as the bombing of homes, or pubs, or assassinations would be war criminals. The status of the Northern Ireland conflict as a war or not also impacts the imprisonment of paramilitary perpetrators. The IRA and other outlawed militias have insisted that the inmates within British jails that are part of their membership should be treated as prisoners of war and not as common criminals. Such a status would imply rights such as not having to wear prison uniforms and not having to accept certain work assignments, as well as other Geneva Convention-type rights of prisoners of war. Disputes over this issue have been quite significant in a number of contexts, including the hunger strike of the early 1980s.

XXXII. MOMS' MARCHES

Mary: None of your causes are worth one more dead son, one more maimed nephew.

Betty: None of them.

Sean: (addressing Mary) This is a war. People get hurt. People die. We are fighting to liberate a nation. Your humane words are, at best, weakness in the face of tyranny. At worst they are treason.

Mary: I recognize that as a threat. We are not afraid of your threats anymore. The decent people in the middle, we mothers and wives, are tired of seeing our innocents blown up. Your fanatic ideals

¹⁷⁸ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 3, 75 U.N.T.S. 287, 288–290.

cannot keep us company at the dinner table, comfort us when we are sad, nurse us when we are sick. We are tired of losing our families to your fanatic abstractions.

Betty Williams and Mairead Corrigan, a Catholic and a Protestant homemaker respectively, won the Nobel Peace Prize in 1976.¹⁷⁹ For a short time, it appeared possible that their Northern Ireland Peace Movement would unite the majority of people in Northern Ireland, Catholic and Protestant, and force the Loyalists and Republican paramilitarists into retreat. This particular thrust for peace and reconciliation failed as extremists continued their bombings and murders, the British government continued its policy of internment without trial, and the IRA launched its prison hunger strikes.¹⁸⁰ However, the efforts of Mrs. Williams and Mrs. Corrigan may have planted a seed that germinated only two decades later.

XXXIII. CONCLUSION

Poem lyrics of "The Lake Isle of Innisfree" by William Butler Yeats:

I will arise and go now, and go to Innisfree,
And a small cabin build there, of clay and wattles made:
Nine bean-rows will I have there, a hive for the honeybee;
And live alone in the bee-loud glade.
And I shall have some peace there, for peace comes dropping slow;
Dropping from the veils of the mourning to where the cricket sings;
There midnight's all a glimmer, and noon a purple glow,
And evening full of the linnet's wings.
I will arise and go now, for always night and day
I hear lake water lapping with low sounds by the shore;
While I stand on the roadway, or on the pavements grey,
I hear it in the deep heart's core.¹⁸¹

Students of the Troubles and subsequent peace processes in Northern Ireland have on occasion borrowed Yeats' line "peace comes dropping slow" to reflect poetically on the search for resolution to the Northern Ireland crisis. From a standpoint of interpretative purity, these observers have gotten it a

¹⁷⁹ *The Nobel Peace Prize 1976*, *supra* note 128.

¹⁸⁰ DIXON, *supra* note 25, at 180–87, 204–07; Robert P. Connolly, *Mothers Built Bridges to Irish Accord*, BOSTON HERALD, Sept. 17, 2000, at 29, available at LEXIS, News Library, Bherld File.

¹⁸¹ DANIEL HALPERN, *HOLY FIRE: NINE VISIONARY POETS AND THE QUEST FOR ENLIGHTENMENT* 186 (Harper Perennial 1994).

little wrong. As seen from the entire poem, Yeats was not primarily focused on peace as the ending to war, but more on a Thoreau-like pastoral longing. Notwithstanding this strain on literary context, the words seem to work nicely in their patient hopefulness, in their ambiguity, and in their source: a nationalist Irish poet with an Anglican background.

Ambiguity has aided both the Republic of Ireland's transition to democracy and the formative stages of the peace process in Northern Ireland. In the case of the Republic, lack of clarity surrounding its sovereign status in earlier decades enabled it to evolve away from the British Crown and to establish democracy without interference from the former imperial power. In the case of Northern Ireland, negotiation of the Good Friday Agreement in 1998 was made possible only through a new ambiguity regarding identity and sovereignty. The Agreement recognized that residents of the North need not be forced to choose between being British or Irish unless they wish to do so. In any event, a person's identity, whether unitary or mixed, would not prevent her from enjoying equal rights in the territory. Furthermore, sovereignty was recognized as divisible, with the Agreement creating shared jurisdictions across communities, across the north-south border, and across the Irish Sea between Ireland and Britain.

Although beneficial in the formative stage of the peace process, ambiguity has proved deleterious at the implementation stage. Trust has suffered. And it is trust that the nationalist and unionist communities need in each other in order for the peace process to triumph. Republicans have exploited the ambiguity surrounding the process of decommissioning weapons and loyalists have exploited the uncertainty regarding power-sharing obligations. Both extreme camps have alienated would-be moderates on the other side and caused the polarization evidenced in the November 2003 elections. For the sake of Ireland, ambiguities that soften exclusivist claims must be preserved, but those which seek cynical and one-sided advantage must be purged.

